



# PROTECTION OF WHISTLEBLOWERS

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## INTRODUCTION

### **The need to protect whistleblowers**

The corrupt actions of public servants employed by public organizations - actions that constitute an abuse of their power - harm the public interest. The immoral dimension of these actions is reflected in the fact that instead of being served by the government authority, as is appropriate, citizens become subordinate to the particular whim of the public servant wielding the power.

The Israeli legislator recognizes different forms of the abuse of power and affords protection for the public servant who exposes an act of corruption, a severe breach of proper administration or a serious infringement of the law. It also defines a serious violation of proper administration or a severe contravention of legislation as an act of corruption. In this paper, we will refer to all the actions listed above under the general term of "corruption".

Corruption is a phenomenon that is difficult to identify. Information gaps between the employees of an organization and people outside it contribute to the relative ease with which it is perpetrated and concealed.

While enhanced regulation and stricter law enforcement have been the usual response to misconduct and corruption in the public sector, the very essence of corruption, which is invariably committed in secrecy, with few witnesses, if any, and between willing participants, means that the normal crime-busting agencies may experience challenges to deal with it efficiently.

Often corruption is discovered by virtue of employees of the organization who have the knowledge and relevant training to identify improper processes. The willingness of individuals to disclose or 'blow the whistle' on wrongdoing and malpractice in both the public and private sectors therefore plays a vital role in combating corruption, strengthening democracy and accountability, limiting mismanagement, saving lives, protecting the environment, upholding the rule of law and ensuring the proper use of public resources. A whistleblower is a valuable information source that the government or the public cannot get from any oversight systems, because they are insiders of the organizations. They are most knowledgeable about what their agencies are doing.

There are a number of reasons for protecting whistleblowers. It is first and foremost in the public interest to protect whistleblowers, in order to ensure the proper functioning of the public systems acting for the benefit of the public. Employees who decide to report acts of corruption form an important component of the bulwark defending the integrity of public service; their protection is thus

a national interest. Whistleblowing is critical in fostering a culture of transparency, accountability, and integrity.

Another reason is based on the right to freedom of speech. Viewed through this lens, publicizing acts of corruption is considered the employees' right to freedom of speech.

A further reason stems from the recognition of the right of an employee to a work environment that is free of corruption. According to this approach, the right of employees to a corruption-free work environment is no different from their right to a work environment that is free of danger to their health or safety.

The aim of this Best Practice Paper (BPP) is to formulate a practical document that addresses the investigation of complaints of those wishing to receive protection for exposing acts of corruption. The document is based on the immense professional experience acquired by the State Comptroller and Ombudsman of Israel through the investigation of such complaints, while recognizing the relevant experience and knowledge accumulated by other countries of the world. The paper is aimed at the various institutions across the globe that deal with the subject of "whistleblower protection", and institutions that will in the future receive the authority to do so.

The first chapter of this document will examine the normative aspects of the protection of whistleblowers, taking into account international norms and the norms established by Israeli legislation on the subject.

The second chapter will address the systematic framework within which the Israeli Ombudsman acts, as well as the unique applied model that has been developed for investigating requests for protection. This chapter will detail how the complaint of a person requesting protection is investigated in practice.

The third chapter will deal with the legal representation for which those requesting protection are eligible. It will also discuss the support given to those seeking protection by a social worker employed by the Office of the State Comptroller and Ombudsman of Israel. This chapter will explain the aim of this kind of support and will detail its special characteristics, such as addressing the various needs of the person seeking assistance.

The fourth chapter will deal with the support and work tools given to the investigation team. As will be shown, the Office's experience acquired over the years has revealed that the investigation team

play a crucial role in creating an optimal protective framework and that they must therefore receive support that will assist them in dealing with the complex issues inherent in their work.

## DIFFICULTIES FACING WHISTLEBLOWERS

Despite their importance, whistleblowers are treated by society in an ambivalent manner - as either saints or sinners. While there are those that see the whistleblower as a person acting courageously for the benefit of the whole of society, others consider the act to be treacherous and the whistleblower a person unfaithful to the organization.

The negative attitude towards whistleblowers is frequently reflected in the opinions of the public at large. In addition, this attitude finds expression in the consequent victimization of the whistleblowers and the acts of retaliation against them on the part of the organizations and their employees, who frequently see the whistleblower as a threat.

Whistleblowers therefore often risk their livelihoods, their reputations, their lives and even the lives of their families to expose information of significant public importance, yet they do so at grave risk to themselves.

The aims of the retaliation are thus likely to be diverse and include among others:

- Applying pressure on the whistleblower to make them back down.
- Casting doubts on the whistleblower's credibility.
- Isolating and distancing the whistleblower from information and the organization.
- Forcing the whistleblower to be on the defense, thus making it difficult for them to expose the corruption.
- Deterring other employees from exposing acts of corruption.

### **Types of retaliation**

Organizations commonly react to the exposure of acts of corruption by attempting to terminate the employment of the employees or worsen their terms of employment to the extent that they "choose" to leave their place of work. In some cases, the dismissal or worsening of work conditions will not be immediate so as not to be seen as an act of reprisal.

Other common reactions are threats of taking legal action against the whistleblower or the taking of other measures, such as filing a complaint with the police or a defamation suit.

The acts of retaliation against the whistleblower can take several forms:

### **Disciplinary**

- Taking disciplinary action against the whistleblower on the basis that the disclosure is a breach of their employee obligations (such as confidentiality).
- Threat of taking disciplinary action, or the actual taking of disciplinary action, against the whistleblower in matters that are not related to the exposure of the corruption and that can lead to suspension or be used to try to justify dismissal.

### **Occupational**

- Professional isolation, such as failure to be included in meetings, disconnection from computerized systems or other work resources, removal from organizational channels of information and others.
- Unwarranted alteration to ordinary working arrangements such as removal of authority, sometimes to the extent of the employee being left without work to do.
- Overburdening the employee with assignments with the aim of tripping them up.
- Physical isolation, such as distancing the whistleblower to another part of the building or to another building altogether.
- Over-monitoring the work of the whistleblower in order to find procedural irregularities.

### **Financial**

- Harming wages and accompanying conditions, such as reduction in scope of work, reduction in salary components, reduction or cancellation of overtime or standby hours.
- Preventing training that could confer the right to a salary increase.
- Demotion or delay in promotion.

### **Personal**

Offensive treatment by superiors, including:

- Humiliation and abuse within the workplace, e.g. shouting, insults, demoralization, ridicule and disparagement.
- Estrangement.
- Speaking insultingly about the whistleblower to the other employees.

Offensive treatment on the part of superiors is likely to encourage, openly or covertly, the rest of the staff to act this way. The failure of superiors to intervene in such behavior of the other members of staff towards the whistleblowers is also offensive treatment.

Whistleblowers also frequently suffer from alienation and social exclusion on the part of work colleagues. Some of the reasons for this treatment by colleagues are:

- Fear that they will be seen as supporting the whistleblower or collaborating with them.
- Fear of being marked as problematic workers, while desiring to keep their job.
- Fear that the exposure of the corruption will adversely affect them as employees of the organization.

### **Abuse of the mental state of the whistleblower**

Some organizations make disparaging remarks about the stability and mental health of the whistleblower in order to defend themselves against the whistleblower's claims of victimization. The aim of this is to delegitimize the claims of the whistleblower and to divert attention from the issue of the corruption to the mental condition of the whistleblower. This can be done in the following ways:

- Using the emotional reactions of the whistleblower as a basis for allegations about their mental condition.
- Using against the whistleblower information about them receiving emotional support.

### **Effects of the retaliation**

The price to be paid for exposing corruption is particularly high. Potential reprisals following the exposure of corruption are likely to affect the different life circles of the whistleblower and important aspects of their day-to-day life such as work, income and relationships with their spouse and children, and general emotional wellbeing. Termination of employment or reduction in salary or worsening of terms of employment often leads to a significant loss of income; exacerbated by legal and/or medical costs resulting from the disclosure. The family is also not immune to the effects of exposing corruption, and in many cases, the functioning of the whistleblower within their family and close relationships is adversely affected.

Retaliation generates a continual state of stress that affects the whistleblower's physical and mental health. With regard to physical health, common repercussions of retaliation are sleeping problems, breathing difficulties, high blood pressure, palpitations, anxiety attacks, tiredness, headaches, hair



loss and tremors. From an emotional and mental aspect, whistleblowers frequently report a sense of isolation, helplessness, melancholy, fear, frustration, shame, difficulty in concentrating, restlessness, tension, irritability, anxiety, depression and more. Having to cope with the difficulties over an extended period of time even leads some whistleblowers to attempt suicide.

# CHAPTER 1: NORMATIVE ASPECTS OF THE PROTECTION OF WHISTLEBLOWERS

## International Instruments

Many countries around the world, including Israel, attach great importance to the proper functioning of public authorities and to the upholding of organizational integrity. In consequence, they encourage the employees of these bodies to expose improper acts. The 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service including the Principles for Managing Ethics in the Public Service and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service were among the first.

In addition, different legal provisions have been enacted for the protection of whistleblowers. The Israeli legislator has also established several legal provisions that regulate the protection of whistleblowers from the violation of their rights by their employer. The protection of whistleblowers has also been regulated by international norms, such as:

### **(1) United Nations Convention against Corruption**

The United Nations Convention against Corruption was adopted in 2003 by the UN General Assembly. The convention generated global recognition of the need to protect whistleblowers and it constitutes the first binding legal document in international law that is aimed at preventing corruption. The convention obligates the states who signed it to take a wide range of steps to stamp out corruption; amending laws, institutions and procedures. Clause 33 of the convention deals with the establishment of appropriate legal means of protection for people who report unjustifiable actions to the relevant authorities, in good faith and based on sufficient evidence.

### **(2) Directive (EU) 2019/1937 of the European Parliament of the Council of 23 October 2019 on the protection of persons who report breaches of Union law**

In 2019, the European Parliament adopted a new directive designed to protect whistleblowers throughout Europe. After being adopted by the Council of the European Union, the directive came into force in December 2019. EU member states were given two years to incorporate the regulations into their state legislation. The aim of the directive was to create effective protection for whistleblowers in order to prevent violations of the law that harm the public interest.

The underlying premise is that the effective protection of whistleblowers will not be obtained to a sufficient extent by states working alone in an uncoordinated manner, but only through EU actions for establishing minimal, joint standards for protecting whistleblowers. It is expected that EU member states will ensure the designated, comprehensive and coherent protection of whistleblowers against retaliation.

In addition, whistleblower protection requirements have been introduced in the Council of Europe Civil and Criminal Law Conventions on Corruption,<sup>1</sup> the Inter-American Convention against Corruption,<sup>2</sup> and the African Union Convention on Preventing and Combating Corruption.<sup>3</sup>

Furthermore, in 2010, the importance of whistleblower protection was reaffirmed at global level when the G20 Anti-Corruption Working Group recommended that G20 leaders support the *Guiding Principles for Whistleblower Protection Legislation*, prepared by the Organisation for Economic Co-operation and Development (OECD).<sup>4</sup>

The Office of the State Comptroller and Ombudsman of Israel believes that Ombudsman institutions around the world are the most suitable body for investigating the complaints of whistleblowers, in light of the special characteristics of these institutions, including independence, objectivity, impartiality, investigatory authority, and employment of proficient and professional manpower.

## **The protection of whistleblowers in Israel**

The State Comptroller and Ombudsman of Israel is an independent, objective official answerable only to the Knesset (Israeli parliament) and is not dependent on the government.

The Office of the State Comptroller and Ombudsman of Israel is both the external state audit institution, responsible for the proper administration and integrity of public bodies, and the Ombudsman, responsible for the investigation of public complaints by means of the Office of the Ombudsman (Office). This amalgamation of functions is unique and enjoys significant advantages. The public bodies supervised by the Office of the State Comptroller and Ombudsman include government ministries, local authorities, government companies, statutory corporations and others.

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<sup>1</sup> Council of Europe Civil Law Convention on Corruption, Article 21; Council of Europe Criminal Law.

<sup>2</sup> Inter-American Convention against Corruption, Article III(8).

<sup>3</sup> African Union Convention on Combating Corruption, Article 5(6).

<sup>4</sup> OECD Whistleblower protection: encouraging reporting, July 2012.

The position of the Ombudsman was codified by law in 1971 and for the past 50 years, the Office of the State Comptroller and Ombudsman has been the address for complaints of any person harmed by a public body in Israel.

In 1981, the Knesset amended State Comptroller Law to increase the jurisdiction of the Israeli Ombudsman to protect whistleblowers, authorizing the issuing of binding orders designed to protect public servants whose rights have been infringed as a result of them exposing corruption or improper practices in their workplace.

There are two laws in Israel that regulate the protection of whistleblowers:

- State Comptroller Law, 5718-1958 [Consolidated Version]
- Protection of Employees (Exposure of Offences, of Unethical Conduct and of Improper Administration) Law, 5757-1997

This document will focus on State Comptroller Law, which is the relevant legislation for the work of the Office. Those seeking protection under Protection of Employees (Exposure of Offences, of Unethical Conduct and of Improper Administration) Law should turn to the Labour Tribunal. A person seeking protection as a whistleblower can choose which course to take.

People requesting the protection of the Office of the Ombudsman are called "protection seekers" since the decision as to whether or not they are whistleblowers is reached by the Ombudsman when the investigation of the request has been completed. Protection seekers are not required to pay for the handling of their request; nor do they need legal representation.

Protection seekers contact the Office after exposing the corruption via intra-organizational channels or, in certain cases, via extra-organizational channels as well. Although in Israel, there exist mechanisms for reporting corruption anonymously, requests for protection are filed with the Office of the Ombudsman in cases, where the identity of the persons who have exposed the corruption is known to the organization, or where they are suspected of having exposed the corruption, and the Office is requested to grant protection from the ensuing retaliation.

It should be emphasized that the Office is not authorized to investigate the claims of the protection seekers relating to the corruption itself. These are investigated by other bodies responsible for doing so, whether by the audit divisions within the Office of the State Comptroller and Ombudsman, by relevant regulatory bodies, or by the Police where there arises suspicion of the perpetration of criminal acts.

Under State Comptroller Law, several conditions must be met in order to receive the Ombudsman's protection; the person must have disclosed corruption in good faith and following the appropriate procedures, and been retaliated against and harmed for doing so. These elements are explained in further detail below:

## THE ACT OF EXPOSING

- (1) Notification – The employee is required to prove that they, or a person helped by them, gave warning to their superior or to any other person who is authorized to examine claims of corruption, such as the legal advisor of the body, the internal auditor, the police etc. Or that they helped another person give warning, of acts of corruption committed in their place of work, or refused to cooperate with these acts. Alternatively, the employee is required to prove that they refused to cooperate with the acts of corruption.
- (2) Proper procedures – Notification of an act of corruption must be made in accordance with proper procedures. In general, in order for a notification to be valid, it must be addressed to the person authorized to check the acts within the internal mechanisms of the organization, or outside of it, such as to the State Comptroller or the enforcement authorities. However, it is possible to give the employee protection even if the notification was not given in accordance with the proper procedures, if the employee gives a reason justifying this.
- (3) Good faith – The employee genuinely believed that the acts of corruption that they reported were perpetrated and they had reasonable grounds for believing so.

## RETALIATION

An act of the superior, or someone acting on their behalf, against the employee, harming the rights, position or status of the employee, whether actively or passively by failing to prevent the retaliation.

## CAUSAL CONNECTION

The harmful act was in response to the exposure. In order to meet the requirement of causal connection, it is sufficient that the exposure of the act of corruption contributed significantly to the harmful act. The onus is on the employer to prove that the exposure of the act of corruption did not contribute significantly to the harmful act about which the employee has complained. The employer

can meet the burden of proof if they prove, for example, that they had relevant grounds for justifying the act.

Where the above conditions have been met, the Ombudsman has the authority to give different remedies required for attaining justice.

The Ombudsman has broad authority in deciding which remedies to give and the appropriate time for providing it in a manner befitting the circumstances.

A variety of remedies can be given at any stage of the investigation procedure, whether during it - for example, as a provisional order - or upon its conclusion - as a permanent order.

Provisional protection order - an order aimed at putting the existing situation on hold in order to prevent continuing harm to the person requesting protection or to their rights in the course of the investigation, if there are grounds for concern that by the end of the investigation it will not be possible to restore the situation to its former state. A provisional order is issued in cases where there is prima facie evidence that the above conditions for receiving protection have been met; this order is by nature limited in time and does not evidence that the request for protection was justified. When determining this remedy, the Ombudsman must ensure that it will not interfere with the continued proper functioning of the public body.

Permanent protection order - an order issued at the end of the investigation, aimed at granting protection for the person requesting it, where the request has been found justified, that is to say the conditions for receiving protection have been met. In the framework of the protection order, the Ombudsman is authorized to grant different remedies such as cancellation of dismissal, granting of compensation and the relocation of the whistleblower to a different position or organization. Here too, when determining the remedy, the Ombudsman must ensure that it will not interfere with the continued proper functioning of the public body.

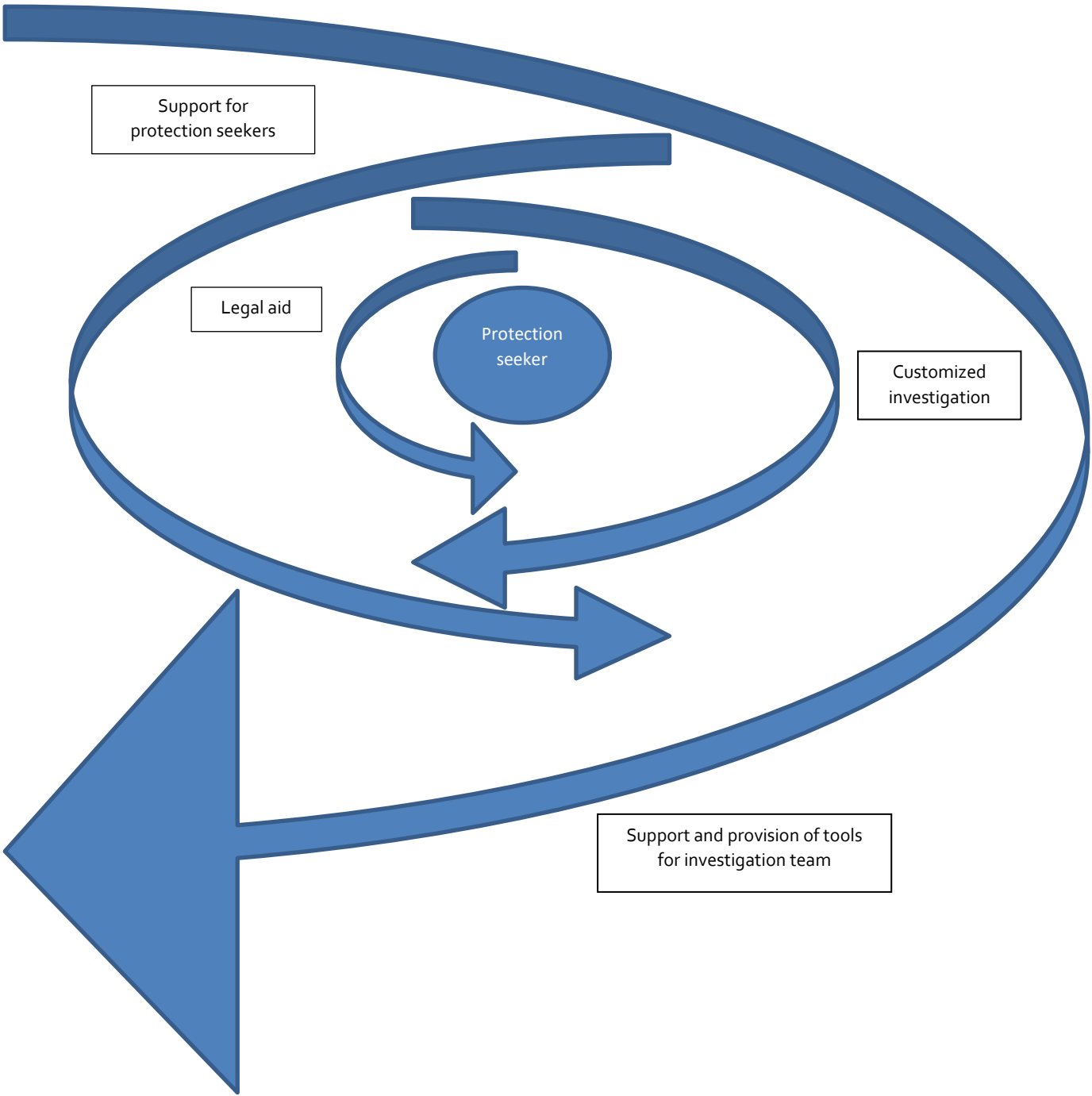
At all stages of the investigation, the parties may reach agreement outside of the procedure. These agreements can make future work relations possible or in appropriate cases, enable the termination of work relations under terms that are agreeable to the parties, such as the granting of financial compensation. Sometimes, one of the parties is interested in a mediation process or an attempt to reach agreement with the Ombudsman's backing, asking for this at one stage or another of the investigation procedure.

The Ombudsman enables parties to reach agreement, whether through negotiations, after which a decision is given validating the agreement reached; or through mediation, which can be conducted in a special mediation center within the Office, where mediations are conducted by specially trained members of staff (see also IOI Best Practice Paper Issue 8 on “Mediation”).

The experience of the Office extends over 40 years, during which it has investigated the complaints of hundreds of employees seeking the Ombudsman's protection. Throughout these years, numerous provisional and permanent protection orders have been granted to employees, in addition to the decisions validating in writing the agreements reached between the parties.

This experience has led the Israeli Ombudsman institution to develop a unique model aimed at providing those seeking protection with an optimal protective framework, including a customized investigation procedure, the possibility of receiving free legal representation, the support and assistance of a social worker employed by the Office and the provision of tools for the investigation team. The following is a diagram of the model that will be explained in detail in the following chapters.

Optimal Protection Framework





## CHAPTER 2: SYSTEMATIC FRAMEWORK AND APPLIED MODEL FOR INVESTIGATING REQUESTS FOR PROTECTION

This chapter will present the systematic investigation framework created by the Office of the Ombudsman of Israel (Office), which includes the handling of requests for protection. It will also discuss the guiding principles for a model for the optimal investigation of requests for protection and the model that has been developed.

### **Systematic investigation framework**

Optimal complaint investigation requires the making of special arrangements by the organization. In order to optimize the procedures for investigating public complaints, including requests for protection, the Office has created a systematic investigation framework based on the proper preservation and management of acquired knowledge, standardization, accessibility of services and information and appropriate professional training.

#### PRESERVATION AND MANAGEMENT OF ACQUIRED KNOWLEDGE

The information received in the course of investigating a request for protection constitutes the infrastructure for determining subsequent factual findings and legal conclusions. It is vital that the information upon which a decision is based is reliable and precise as far as possible.

The proper and effective preservation and management of information is thus required throughout the investigation procedure. Optimal management of acquired knowledge also necessitates the immediate and easy location of required materials. In general, the investigation of requests for protection is characterized by the need to handle a wide and diverse scope of information, which makes the task even more complex.

The Office takes care to preserve and manage the information in an optimal manner throughout the procedure. Thus, for example, it ensures precise documentation of materials obtained during meetings held in the framework of the investigation; a professional member of staff types the information conveyed verbally during the meeting and at the end, the person questioned is asked to read the minutes, correct inaccuracies and finally sign the document to signify approval of its content. Furthermore, the information conveyed and gathered in the course of the investigation is stored in the designated digital system for the handling of investigation files, in an accessible and available

manner. This ensures the preservation and backup of the information and enables the swift location of relevant materials.

## STANDARDIZATION

The requests for protection are multifarious. Together with the need to take into account the circumstances of each case, it is important to conduct a structured procedure aimed at unveiling the truth and reaching a just decision. The structured procedure (which will be presented below) outlines the order of the investigation and the identities of the parties at its various stages. By structuring the work procedure, the investigation is rendered clear and effective, which serves both the Office's staff who are conducting the investigation and the parties whose matter is being investigated. The work procedures and the creation of a standard for writing documents, as exist in the Office, constitute a frame of action within which the investigation team can apply discretion, according to the circumstances of each case.

## ACCESSIBILITY OF THE SERVICE AND INFORMATION

It is important that the public become familiar with the Ombudsman institution and with the possibility of turning to it for protection. Accessibility of the Office includes giving information about how to turn to it, creating diverse ways of contacting it, removing obstacles that prevent receiving assistance and providing information about a procedure that is legal in nature in a language that is understandable to the public at large. The following are the measures taken to achieve this:

- The Office conducts informational activities in various organizations in order to acquaint them with the service provided for the public.
- The Office conducts informational activities for other public servants who are likely to come across whistleblowers - such as police investigators and auditors - and lectures in academic forums.
- The Office conducts open study days for different audiences, the staff of bodies subject to investigation, representatives of NGOs and others.
- The Office distributes to the public flyers in different languages containing information about the Office.
- The regional bureaus of the Office are dispersed throughout the country in order to be accessible to a wide range of communities.
- People asking to receive recognition as whistleblowers are given information sheets detailing the procedure.
- Complaints may be filed in various ways, including verbally and online.
- No legal representation is required in the request for protection procedure and no fee is charged.

## APPROPRIATE PROFESSIONAL TRAINING

In light of the diverse challenges facing the investigation teams, it is important to give them appropriate professional training. The investigation teams undergo training in the various professional fields that are relevant to their work, including workshops and training in:

- understanding and coping with situations of crisis and stress;
- dealing with multiculturalism and multicultural diversity;
- questioning and eliciting oral information;
- coping with challenging complainant behavior;
- addressing the different aspects of the relevant legislation;
- designated writing course.

## **Guiding principles behind the model for investigating requests for protection**

The investigation model that was developed by the Office is based on several principles. The underlying concept is that the investigation is a tool for unveiling the truth and that it is important to take into account the complexity of the material. When investigating the requests, consideration must be given to the privacy of the protection seeker and the sensitivity required for handling the request, as well as the wider perspective of the work relations and the desired continued functioning of the public organization. Two of the most significant principles stemming from this concept are flexibility and open-mindedness.

### FLEXIBILITY

Flexibility is important in the investigation of requests for protection, both in the management of the procedure and the decision-making. In this regard, the Ombudsman has been vested with broad authority for examining every aspect of the complaint in question, as he deems fit and in accordance with his discretion. The investigation of the request is thus not subject to procedures or rules of evidence, it is not necessarily limited to the claims of the parties only and the Ombudsman has authority to contact any public body or person and summon them to give information. This broad discretion enables the flexibility required for attaining justice and granting the appropriate remedy in each case.

## OPEN-MINDEDNESS

It is necessary to be open-minded throughout the investigation procedure and to take care not to become entrenched in a particular notion regarding the whole picture at the early stages of the procedure. Early fixation on a particular notion with regard to the course of events and the identity of the side that is "right", is likely to bias the investigators' interpretations of the information that is subsequently received. If the investigation team falls captive to a particular notion, it is possible that this will lead to all the findings being based on information that is interpreted in a biased manner in order to serve or support that notion. The aim is to avoid situations whereby the investigation team determine the outcome of the investigation at an early stage.

In order to achieve the aim of the investigation, which is first and foremost to arrive at the truth, the Office has created a special model. The proposed investigation model includes mechanisms that take into account the nature of the investigation procedure as an ongoing process throughout which meetings are held with different players from within and without the organization, and documents are received. As said, the investigation material gathered continuously throughout the procedure is likely to shed additional light and can change the picture as perceived up until that point.

The following mechanisms are designed to allow flexibility and open-mindedness to different perspectives and a variety of standpoints:

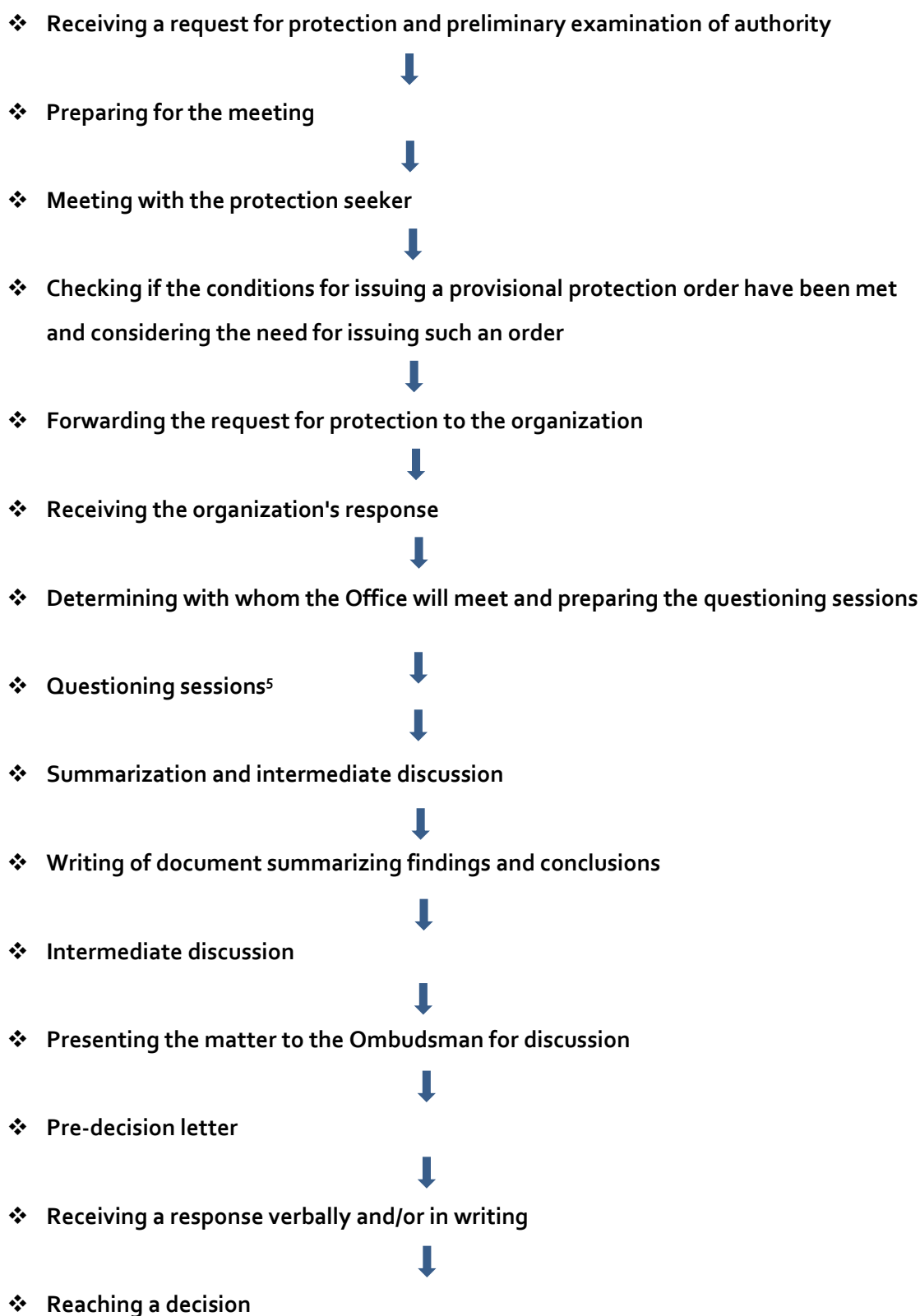
- Teamwork – The investigation teams comprise two lawyers who work together on the request for protection. This work method enables continuous discourse between the two lawyers who are familiar with the details of the case, making it possible to share with each other their impressions and insights from their different perspectives and to brainstorm.
- Discussions – Fixing main junctions in the investigation procedure at which discussions will be held. Not only the investigation staff will take part in these discussions, but also the Office's legal advisors and senior management, and sometimes the Ombudsman as well. The purpose of these discussions is to examine and give broad consideration to the significance and relevance of the information gathered, from the additional perspective of people who are not necessarily involved in the day-to-day handling of the case. By examining the matter in this fashion, subsequent plans of action crystallize.

- Decision-making framework – At the final stage of the investigation procedure, a meeting is held with the Ombudsman, together with all of the staff involved in the case, including the investigation team, the relevant head of department, the legal advisors, the Head of the Office and staff from the Ombudsman's bureau. This broad forum takes place in order to enable an informed discussion and to deal with any issues that have arisen, before reaching a final decision. At this meeting, different options for resolving the conflict between the parties are considered, whether by reaching a decision on the merits of the case or by other means. In addition, the appropriate (proportional) basket of remedies is examined, aiming on the one hand to protect the whistleblower and deter future acts of corruption, and on the other to enable the desired continued functioning of the public body.

## **Optimal investigation model**

We will now present the Office's model for optimal investigation. This is a dynamic model, comprising junctions for examining and applying discretion according to the developments and the overall circumstances. It should be pointed out that this is a general model and there may naturally be cases in which a different model will be adopted in order to achieve the results detailed above.

## Investigation Model – Flowchart



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<sup>5</sup> In some cases, following the questioning session it becomes necessary to receive additional information from sources with whom we have met, or others, and where required supplementary investigations are conducted.

### ❖ **Receiving a request for protection and preliminary examination of authority**

Upon receiving a request for protection, it is necessary to make a preliminary examination of the request in order to ascertain if the Ombudsman institution has the required authority for handling it. If it transpires that the Office does not have the authority to investigate the request for protection, in accordance with the relevant legal provisions - for example, the complaint is against an NGO that does not receive government support or there are no special circumstances enabling an investigation - the request will be rejected straightaway and an appropriate notice will be sent to the protection seeker. In this case, the complainant will be referred to the body authorized to handle their matter. If the request is within the Office's authority, the investigation procedure will commence in accordance with this model.

### ❖ **Preparing for the meeting**

In most cases, the investigation procedure will commence with a meeting with the protection seeker. It is recommended that the investigation team hold a preliminary meeting in preparation for the meeting with the protection seeker.

#### **TIP:** Preparation for the meeting with the protection seeker

The Office recommends considering the following issues at the preliminary meeting in preparation for the meeting with the protection seeker:

- Identification of the main players in the request for protection.
- Construction of a preliminary timeline of the occurrence of events.
- Identification of points or aspects that require clarification.
- Examination of the need for additional documents.
- Drafting of questions based on the preparatory work.

### ❖ **Meeting with the protection seeker**

The meeting with the protection seeker has several aims, including becoming acquainted with each other, giving a general presentation of the State Comptroller and Ombudsman institution's powers and authority, clarifying expectations and receiving a full picture of the matter from the protection seeker's viewpoint, including the presentation of documents that are likely to support their case.



At the meeting, the investigation team informs the protection seeker of the possibility of receiving the assistance of a staff member of the Office/ - social worker - who gives support to protection seekers alongside the investigation procedure. The investigation team also informs the protection seeker that the Ombudsman does not act as a legal representative, agent, or advocate of the employee or former employee, and advises them of legal remedies at their disposal, including access to state legal aid free of charge.

These options are part of the support framework that the Israeli Ombudsman offers protection seekers. This will be elaborated on in the next chapter.

#### **TIP: Clarifying expectations**

It should be taken into account that in most cases, the protection seeker is in a state of uncertainty or stress, both due to the sequence of events in their workplace and their lack of familiarity with the Ombudsman and its *modus operandi*. It is therefore very important to clarify expectations in a clear and orderly manner regarding the procedure for the protection seeker. The clarification of expectations will focus among other things on:

- Explanation of the conditions for receiving protection and giving an "Information Sheet for the Complainant".
- Explanation of the nature of the investigation and its complexity.
- Clarification that the investigation procedure does not examine the alleged corruption itself.
- Reference to the duration of the procedure.
- Information about the diverse investigation methods, including questioning sessions, request for documents and others.
- Emphasizing the fact that the investigation procedure is objective and neutral.
- The importance of maintaining a substantive, working atmosphere between the parties, in the interest of the issue at hand.

#### **TIP: Documenting meetings**

As with all the questioning sessions, it is recommended that the meeting with the protection seeker be documented in minutes that are typed by a professional who performs this task only. The investigation team will thus be free to manage the meeting optimally and be attentive to the information being conveyed, as well as alert to the need to ask questions relevant to the information conveyed or to receive clarification regarding significant points.

### ❖ **Ascertaining whether a provisional protection order may and should be made**

If there arises concern that the protection seeker will be irreversibly harmed in the course of the investigation, to the extent that reinstatement will be impossible at the end of the investigation procedure - for example, if the employee is about to be dismissed from work - the need to issue a provisional protection order will be considered. Sometimes, the Office suggests that the public body postpone the act that is likely to harm the protection seeker until the completion of the investigation of the complaint. If the body agrees, it is not necessary to issue a provisional order.

The possibility of providing a provisional order must be considered throughout the investigation procedure and in accordance with the circumstances.

It is necessary to take into account that the issuing of a provisional protection order affects both the protection seeker and the organization. It is thus recommended to limit the validity of the order to a defined period, with the possibility of extending it according to the circumstances. It is furthermore suggested that the order provide clear directives to which the parties must conform.

#### **TIP: Provisional protection order**

It is suggested that the provisional order the following matters:

- The prima facie basis for issuing the order.
- The issuing of a provisional protection order does not testify to the justification of the complaint.
- The order does not confer on the complainant additional rights to those to which they would have been entitled had they not filed the complaint (i.e. that the order is formal recognition of preexisting protection rights).
- The order does not permit the complainant to shirk their duties as an employee.

**Example:** A protection seeker phoned the investigation team and told them that he had been summoned to a pre-dismissal hearing in two days' time. Fearing for his livelihood, he requested the Ombudsman's intervention. On the very same day, the investigation team met with the protection seeker, who gave them documents and extensive information, which helped them get a picture of the situation as it stood at that time. The Office's management was satisfied that prima facie the protection seeker was being victimized because of the actions he had taken to expose corruption. The management therefore recommended to the Ombudsman that he issue a provisional protection order preventing the protection seeker's dismissal and prohibiting any change to his status or function. The order was issued the following day for the period of a few months, based on the assumption that by then the investigation would be completed.

#### ❖ Forwarding the request for protection to the organization

The request for protection, together with all the relevant documents, must be forwarded to the head of the organization or to another senior managerial source, subject to any confidentiality requirements, with a request to receive the body's response in writing to all the claims raised.

#### **TIP:** Learning the organizational structure

It is useful to seek to understand the organizational structure of the body against which the request has been filed, before forwarding the request to it. Understanding the organizational structure helps to identify the source accountable for the actions of the body, who is authorized to respond on its behalf and represent it.

#### **TIP:** Examining the request for protection prior to forwarding it

It is suggested to check the request for protection carefully before it is forwarded to the organization. Since the request for protection written by the protection seeker is forwarded in its original format to the organization, it is important to examine it for offensive language about the office holders of the organization. The reason for this is the wish to avoid a deterioration of relations in the workplace. If the request contains offensive language, the protection seeker is permitted to reword it before it is forwarded to the body, should they so desire.

### ❖ Receiving the organization's response

Receiving the organization's response is essential for understanding the prima facie sequence of events from its perspective. At this point, and after receiving the versions of the two sides, the investigation team can consider and formulate an optimal and appropriate plan of investigation.

#### **TIP:** Preparation for the questioning sessions

When preparing the investigation plan it is important to study each of the versions given by the parties. This includes:

- Identifying the leading players and the timeline of events in each version.
- Ascertaining any disparities in the parties' narrative and comparing them, while identifying the claims about which there is consensus and those that are in dispute.
- Listing the claims or aspects that require clarification.

### ❖ Determining with whom the Office will meet and preparing the questioning sessions

The purpose of the questioning sessions is to receive relevant information that can help in understanding the whole picture. The participants of the meeting may come from within and outside the organization. Choosing the participants and deciding the order of their appearance are at the discretion of the investigation team, and where necessary the team will consult with the relevant head of department. The questioning is a dynamic and evolving process and it is possible that in light of the information conveyed at these meetings, it is necessary to question additional sources who will shed further light on the matter.

Before every questioning session, the investigation team must prepare an outline of the meeting, as well as the questions and matters that they intend to clarify at the meeting.

#### **TIP:** Choosing the participants and their order of appearance

Summoning people to a questioning has strategic significance. An informed choice of the participants and the order of their appearance will contribute to the efficacy of the investigation procedure and the unveiling of the truth. Things to take into consideration when determining the order:

- The status of the person in the organization who is victimizing the complainant and their powers of influence.
- The hierarchical relationship between the people being questioned, which may affect the credibility of their answers (for example, more junior people potentially being wary of providing evidence that differs from a senior).
- Fear of coordinated answers. Where there exists significant concern about coordinated answers, it is possible to conduct separate simultaneous clarification sessions.

**TIP:** Preparation of preliminary document

It is suggested to prepare in advance a written document, listing the questions and the order in which they will be asked and outlining the course of the meeting. Prior planning contributes to the optimal management of the meeting and to receiving the most coherent and orderly information possible. When preparing the outline of the meeting, the investigation team will take into account discrepancies in the different versions and matters requiring clarification on the timeline of events. A written outline contributes to more effective management of the meeting, and assists the investigation team in focusing on the main issues and taking effective advantage of the limited time at their disposal.

**Example:** A protection seeker contacted the Office, claiming that he was being victimized by several managers, some of whom were directly superior to him and others indirectly. In the course of the investigation, there arose concern that the people accused of victimizing the complainant would try to cover for each other and that summoning each manager to a meeting would enable them to give information to the other and thus impair the efficacy of the questioning. In order to avoid a situation whereby one of the managers convey to the others the content of the meeting and thus coordinate answers with them, all the managers were summoned simultaneously to separate questioning sessions. For this purpose, additional staff members were enlisted ad hoc to the investigation team and comprehensive preparations were made for formulating precise questioning plans for each manager. This effort led to attaining a credible picture of the situation.

## ❖ Questioning sessions

The Office holds questioning sessions with any source that can shed light on the facts, including the head of the public body, the superior against whom the complaint was filed and additional staff members of the body whom the complaint concerns.

The questioning sessions are likely to be prolonged; they are dynamic and constantly evolving and in many cases, new information is conveyed in the course of them.

In most cases, a meeting with the head of the body is conducted at the early stages of the investigation. At this meeting, it is important to clarify expectations on the points detailed above with the protection seeker (see “Tip: Clarifying expectations”, above). Here, too, it is suggested to give the head an information sheet, which lists the main points in writing. In meetings with other sources, a summarized explanation will be given with regard to the questioning session.

It is important to recognize that the conveying of information by staff members of the public body is a sensitive matter. Employees are likely to fear giving information about conduct in the workplace for various reasons, including known retaliation to date against the protection seeker, being in a subordinate position, solidarity with the organization or with individuals within it, and potential coercion by employees accused of the wrongdoing. For this reason, it is important to explain at the beginning of the session that the meeting is confidential and that the investigation team does not inform any of the other parties about its taking place.

### TIP: Meeting

It is important to conduct the meeting as far as possible without interruption in order to ensure:

- Free flow of speech.
- Prevention of coordinated answers.
- Preventing the persons being questioned from comparing their answers with information or documents not presented at the meeting.

**TIP:** Unblemished and substantive procedure

In order to ensure a substantive investigation procedure and prevent the leaking of information, it is suggested:

- Not to allow the person being questioned to record the meeting.
- To accurately document in minutes the course of the meeting and the information conveyed during it.
- To maintain the confidentiality of the minutes and not convey a written copy of them to the person questioned or to any other source (unless it is strictly necessary for the purposes of natural justice for an accused party).
- To ask the person being questioned to review and approve in writing the content of the minutes at the end of the meeting.
- To consider including a paragraph at the beginning of the minutes, briefly explaining the authority of the Office concerning the minutes, such as not giving a copy of them to the person being questioned.

**TIP:** Instructions for the investigation

- The persons being questioned should be informed that the information that they convey will be recorded in minutes and that they will be able to go over the minutes at the end of the meeting.
- It should be explained to the persons being questioned that they will be asked to confirm, by signing the minutes, that they reflect the information communicated.
- It must be emphasized that the minutes are for the purposes of the internal investigation only and will not be conveyed to any other person.
- It should be taken into consideration that in exceptional cases, it may be obligatory to disclose the minutes.
- It is important to maintain open-mindedness and not become entrenched in questions prepared in advance.
- It is important to be alert to discrepancies or contradictions in the information conveyed and to check them in real time.

## ❖ Summarization and intermediate discussion

Upon completion of the questioning stage, the investigation team must analyze and process the information received from the different sources and disclosed by the documents. The team must give the relevant head of department at the Office of the Ombudsman a review of the matters disclosed and hold a discussion as to the next stage of the procedure, taking into consideration the circumstances of the case and applying discretion. At this discussion, they examine the need to continue the investigation and if so, in which manner, or if there exists a sufficient factual and legal basis for formulating a recommendation.

### TIP: Agreements

The parties always have the option, at any stage, of requesting to reach agreement. If they have not done so by this stage, it is suggested considering if there is a possible resolution that could be proposed and agreed to. The parties should be given the different options:

- To reach agreement in the presence of the Ombudsman or the Office's management, in order to ensure joint, substantive discourse. If agreement is reached, it will be validated by decision of the Ombudsman.
- To participate in a mediation process conducted by the Office's trained mediation team, which is separate from the investigation team. The mediation is strictly confidential and the communications made during the process are withheld from the investigation team. Throughout the mediation process, the investigation is put on hold. If the mediation is unsuccessful, the parties return to the investigation procedure.



### ❖ Writing of document summarizing findings and conclusions

At this stage, a comprehensive document is prepared summarizing the investigation, its results and prima facie conclusions proceeding from its findings. The document must be coherent and consistent, and give an orderly and clear picture of the situation in hand.

#### **TIP:** Format of document

It is recommended that the summary document contain clauses addressing:

- The claims of the parties and the sequence of events.
- The findings.
- Whether the conditions for receiving protection have been met: retaliation as a result of exposing corruption.
- The conclusions as to the justification of the request and the appropriate remedy in the circumstances of the case and the consequent recommendation.

### ❖ Intermediate discussion

This is a discussion held with the legal advisors and the Office's management as to whether the investigation conducted suffices. This discussion constitutes an important junction in the investigation procedure, at which a decision is reached as to whether the investigation is complete and it is possible to bring the matter for discussion before the Ombudsman, or if there is a need to continue the investigation. If further investigation is necessary, the management will instruct the team what additional information is required and on what to focus.

In cases where it has been necessary to supplement the investigation, the summary document must be submitted again to the legal advisors and the Office's management, who will decide whether or not to approve it. Once the document has been approved, it is advisable to hold another intermediate discussion to make the document more precise before conveying it to the Ombudsman.

### ❖ Presenting the matter to the Ombudsman for discussion

After forwarding the summary document to the Ombudsman, a discussion is held with the Ombudsman in a broad professional forum. This forum is convened in order to discuss the request

and consider whether to reach a decision on the merits of the case or to try and resolve the dispute by means of conciliation, mediation or a discussion between the Ombudsman and the two parties.

**TIP:** The element of choice

In cases where the parties are given the option of reaching agreement, it is important not to try to persuade them and/or express an opinion on the merits of the case. The choice should be at the discretion of the parties.

❖ **Pre-decision letter**

If at the discussion it is decided to reach a decision on the merits of the case, a "pre-decision" letter must be sent to any side (the protection seeker, the public body) likely to be adversely affected by the decision, for their response. This letter must detail in depth the investigation procedure, the findings of the Ombudsman based on the investigation and the prima facie conclusions stemming from them. In cases where the claims of the two parties are not accepted in their entirety and the parties are likely to be adversely affected, it is necessary to send two "pre-decision" letters, one to each side, simultaneously.<sup>6</sup> An example of this is when the request is found justified, prima facie, but the possibility of giving a different remedy to the one requested by the protection seeker is being considered.

The "pre-decision" letter is sent at this point, in order to allow the party likely to be adversely affected by the decision to respond and put their case forward prior to the Ombudsman reaching a final decision.

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<sup>6</sup> In cases where letters are sent to both parties for their response, the letter to each party does not include the entire findings of the investigation, but only the findings likely to affect the party in question.

#### **TIP: Right of response**

It should be taken into account that after receiving the pre-decision letter, the party required to respond may ask to see documents contained in the investigation file, including internal documents, minutes of questioning sessions with different people and other documents. In these cases, the investigation team must examine, together with the legal advisors and the Office's management, which documents may be shown to them and in which manner.

It is advisable to examine the matter in a way that will draw a balance between the competing interest of the respondent to "have their day in court" and the right of the people who have aided the investigation to privacy. It is also necessary to prevent disclosure of the investigation procedure in a way that will harm future investigation procedures. As part of the right of response, and upon the request of the party that is likely to be adversely affected by the decision, it is possible to conduct a meeting during which the party will be given the opportunity to raise their claims verbally before the Ombudsman or the Head of the Office of the Ombudsman.

#### **❖ Receiving a response verbally and/or in writing**

It is necessary to examine the response received and check if it requires making changes to the findings or conclusions or conducting further investigation. To this end, it is advisable to consult with the legal advisors and the Office's management.

If the response does not warrant changing the findings and conclusions detailed in the "pre-decision" letter - the investigation team will prepare a draft decision.

If after examining the response, the Office feels that it prima facie warrants changing the conclusions - the investigation team will prepare a "pre-decision" letter that will be sent to the other party for their response.

#### **TIP: Drafting a "pre-decision" letter**

It is advisable for the draft decision to be written in the format of a "pre-decision" letter. The draft will also refer to the main arguments put forward in the response to the said letter.

At the end of the process and on the basis of the "pre-decision" letter and any adaptations made in accordance with the response, the investigation team will draft a decision.

### ❖ **Reaching a decision**

The draft decision is forwarded to the Ombudsman for his approval and signature. At this stage, a discussion is held with the Ombudsman, in order to receive the Ombudsman's final decision. The Ombudsman will decide on the most suitable and proportionate remedies for protecting the protection seeker and preventing future improper acts on the one hand, while enabling the desired continued functioning of the public body on the other.

## CHAPTER 3: LEGAL REPRESENTATION AND SUPPORT FOR PROTECTION SEEKERS

This chapter will present the options offered by the Office to the protection seeker for legal representation and the support of a social worker.

### **Eligibility for legal representation**

While no legal representation is required for filing a request with the Ombudsman for protection as a whistleblower, some protection seekers feel they need the assistance of lawyers in the process, as the public body will be represented by its internal legal advisor or by external lawyers. One of the most significant difficulties facing protection seekers is the imbalance in the financing of legal representation.

While the organization generally has legal representation (internal or external) in order to deal with the complaint, the protection seeker is required to cover the cost of representation. The cost of legal representation often affects the ability of protection seekers to receive high-quality legal assistance for a process, which is likely to be prolonged and require a considerable amount of work.

The financing of legal representation places a heavy burden on protection seekers, who may also have to cope with a reduction in their salary as part of the retaliation and victimization suffered by them.

The State of Israel provides a legal aid scheme, under Legal Aid Law, 5732-1972, which aims to enable people with low incomes who are unable to cover the costs of lawyer fees, to exercise their rights through the provision of free legal advice and representation. Eligibility under the scheme is determined by several criteria, including a financial criterion based on income and property ownership. Protection seekers were often found ineligible for Legal Aid since they did not meet the financial criterion.

In order to assist people seeking protection as whistleblowers, the Ombudsman and Ministry of Justice collaborated to amend the legal situation with regard to the financing of legal aid. As a result, people seeking protection as whistleblowers are today entitled to receive legal aid regardless of their financial situation. This development has led to more and more protection seekers being eligible for free legal aid from the state.

Some whistleblowers are also represented by NGOs dealing with the fight against corruption. Notwithstanding, even in cases where the protection seeker is represented by a private lawyer, if their complaint is found justified it is possible to grant them legal expenses at an accepted sum, as part of the remedy.

## Support for protection seekers

Exposing corruption and filing a complaint about reprisal following the exposure causes many difficulties. In most cases, these difficulties affect not only the employee but also their family. In order to help protection seekers and their families who are facing a crisis, the Ombudsman decided to offer them the professional support of a social worker employed by the Office. This service is provided free of charge, alongside the investigation procedure. The creation of this innovative and groundbreaking function was aimed, among other things, at conveying a declarative message regarding the importance of exposing corruption, as well as expressing recognition for the difficulties entailed in doing so.

The idea of providing support for whistleblowers began to crystallize as far back as 2014. Initially, the support was provided by the staff of the Witness Protection Authority. In 2015, a work team was established to lead a pilot program, and subsequently it was decided to create a designated intra-organizational service.

### **TIP:** Creating an intra-organizational service

There are several advantages to creating a support service within the organization:

- The designated support framework generates specialization in this field.
- The lack of dependency on another body ensures availability for all protection seekers.
- Access to those receiving support facilitates receiving feedback about the quality of the service.

The integration of a social worker within the Ombudsman's office, providing professional support for protection seekers, was unprecedented. With no prior experience in the field or information that could be obtained from other sources in the world, the creation of this function was a groundbreaking innovation.

The formulation of the innovative model was reached by studying the day-to-day activity relating to protection seekers and by continuously learning from experience. On the organizational level, the trust and ability to hold open discussion among the different professional sources within the Office formed the basis for the success of this unique model in creating a protective framework for the protection seeker.

#### **TIP: Principles of the support**

- The support is given alongside the investigation procedure and is independent of the procedure and its outcome.
- The support is provided free of charge.
- The support is offered to every protection seeker turning to the Office.
- The social worker initiates contact with the protection seeker and puts forward the option of receiving support.
- The nature of the support is tailored to the special needs of each protection seeker or family member.
- The ways of meeting are varied and include remote communication where required.

#### **TIP: Privacy**

Due to the sensitivity surrounding the receipt of emotional support, particularly in light of the possibility of the employer abusing this information, the office's staff should not convey to anyone information about the support being provided. This should be the decision of the protection seeker.

## **Functions of the support**

The aim of the support is to assist the protection seeker in coping with the difficulties arising from the situation.

The support is an arena in which there is validation of the events that have occurred and the feelings emanating from them. The ability to share these feelings reduces the isolation and the protection seeker's feeling that most of the people do not really understand what they are going through (many experience lack of understanding for this unique situation even from the people closest to them). The expression of feelings and thoughts and the possibility of processing them in an empathetic, attentive

and supportive framework, allows slight relief from the daily struggle, and makes it possible to take respite and gain strength to keep on going.

The support also enables the protection seeker to observe the situations and events within a broader context and from different perspectives. This can help the protection seeker understand how other people in that situation might experience it. Seeing a wider context and understanding the reasons for the reactions or deeds of others, helps to provide meaning and significance to the world, which is generally experienced by the whistleblower as incomprehensible, threatening and arbitrary, thus reducing feelings of helplessness.

The support can provide a framework for considering options, making choices and planning. Within the sequence of events that frequently give rise to powerful emotional reactions, the ability to stop and think is important. Frequently, at the end of the process - whether after a decision has been made or agreement reached with the public body - the situation must be processed. In order to succeed in going on with their lives, it is important that protection seekers look at what has occurred, and recognize and accept the changes that have taken place within themselves and within their lives.



**Example:** A woman requesting a protection order was the esteemed employee of many years standing of a large organization. She was suffering victimization after reporting improper acts within the organization. Her immediate superior and other senior sources within the organization were leading the victimization against her. The victimization included transferring her to a smaller office, which was remote from the department in which she, the department management and her colleagues worked; taking away responsibilities and powers; excluding her from professional meetings and removing her from office email groups. She was also reprimanded for the quality of her work, both verbally and in writing, and was insulted and humiliated publicly; furthermore, her right to benefits that formed components of her wages were ceased and her salary thus decreased significantly. Most of her colleagues, some of whom she considered her friends - people with whom her social relations had extended beyond working hours - began to keep a distance from her and some even ignored her even when she passed them in the corridor. The few who remained in contact with her did so secretly, only in areas where they could not be seen be with her. She felt very isolated at work. She confided in her partner, family members and close friends about what was happening, but felt that they did not understand her suffering. They gave her different advice about how to act, but she felt that this advice was not helpful. After a while, she stopped confiding in her friends and family since she felt that it was not beneficial to her and only burdened them. Her partner remained the only source of support, but she worried that she was burdening him as well and that he would eventually get fed up hearing about what was going on at her place of work. As time went on, she felt a deterioration in her physical and mental wellbeing; she had difficulty falling asleep at night and became tense and anxious. When she was offered support, she agreed to give it a try.

The first stage of the support was characterized by her relating the events from their outset to that point in time, in a repetitive manner, while expressing the intense emotions that the difficulty caused by these acts ignited in her. She felt that the support provided a framework in which she could detail what was happening, together with her feelings, and be understood, without worrying that she was burdening the listener or that the latter would get fed up hearing her. The ability to relate the things and repeat them where necessary enabled her to process them. The responses of the social worker gave her external feedback, making it possible for her to see that her feelings were appropriate responses to the difficult reality that she was experiencing. In this way, her feelings of self-doubt and her internal debate as to whether her response to the situation was exaggerated - doubts that only weakened her further - decreased.

The meetings furnished her with an opportunity to take respite from her hostile reality, to share her thoughts and feelings and to consider different ways of reacting to the things happening to her in the workplace. She learnt to identify acts that ignited particularly difficult responses within her and the social worker helped her learn how to calm herself in these situations.

Later on, she asked to address the way the events were affecting her relationship with her partner and the social worker helped her improve her communication with him, enabling them to discuss what they were going through as a couple during this difficult period.

## Response to diverse and changing needs

It is recommended that the support framework offered to protection seekers be defined broadly as applying to every matter in the life of the protection seeker that relates to and stems from the act of exposing corruption and the subsequent reprisal. A broad definition enables the protection seekers to receive support in a wide range of issues: repercussions of the retaliation on their physical and mental state; events in the workplace; effect on familial and social functioning and relationships; feelings relating to the different stages of the investigation procedure and others.

### **TIP:** Approach of the support to the investigation procedure

It is recommended that the support framework include enabling the protection seeker to refer to the investigation procedure itself and its multi-layered implications. It is important to recognize that the different stages of the investigation procedure affect the protection seeker.

As said, it is suggested that the support given to the protection seeker be continuous throughout the investigation, even during the transition from one stage to another. This is very important for providing protection seekers with a feeling of security, in the knowledge that the support will be there for them throughout the procedure. An additional advantage of continuity is that the bond and trust that have become established over time enable the protection seeker to receive assistance in diverse ways that are likely to take different forms due to various changes in the investigation procedure, the evolving of new needs or the changing of circumstances.

**Example:** The support given to a protection seeker helped her survive in a work environment experienced by her as abusive and cruel on a daily basis. At the time, the support focused on helping her find the strength to go to work every day (which was important to her) and identifying together with her ways of coping, which would enable her to preserve her wellbeing, both on an emotional level, with regard to the things that were going on, and on a practical level, by means of techniques for delaying her instinctive reactions. The aim of this support was to create an arena where she could consider the different options and thus choose the optimal conduct for her in that situation. In time, it was suggested to the parties to take part in a mediation process in order to try and reach agreement via dialogue. Both parties agreed to the process and at the complainant's request, the focus of the support now changed to assist her in preparing for the mediation process.

Initially, it was necessary to work on the complainant's ability to conduct matter-of-fact and constructive dialogue with representatives of the organization towards whom she had such adverse feelings. Since it was important to her to express her feelings about the things that had happened up until then at the start of the mediation, she was given support in mapping out her different feelings, from which she chose those that she felt could be shared with the other party without endangering the continuation of the process. The complainant was also helped in finding ways of expressing her feelings that most suited her. Afterwards, it became possible to address other dimensions of the preparation for mediation, including an examination of her wishes - which goals she wished to achieve, what she was prepared to relinquish, on what she was prepared to negotiate and compromise and others. She also practiced being able to respond quietly to things considered by her as provocative or offensive and to ask her representative to answer instead of her, and so on. All this support helped her to act in a manner that made it easier to reach agreement at the mediation session.

## Termination of the support

The termination of the investigation procedure does not necessarily lead to the immediate termination of support. In most cases, reaching an agreement or making a decision relieves protection seekers, for the first time, of the survival struggle in which they have been living and

enables them to process everything they have been through, which they had previously been unable to do.

Processing is an important stage during which a person who has been through a significant experience succeeds in observing the situation from a wider perspective, creating personal meaning, integrating what has happened as part of their life experience and painting a picture of a future with possibilities and hope. The aim of the processing is to enable the protection seeker to go on with their life without living within the shadow of what has occurred. In addition to the processing task, the support at this stage helps the protection seeker to make arrangements and cope with the ramifications of the decision reached concerning him, or of the agreement reached between the parties.

The decision or agreement reached will influence the aims and content of the support as follows:

In cases where a protection order has been issued, the support of the social worker will assist the protection seeker in becoming resettled at work or in successfully integrating into another position or organization. The support will deal among other things with preparing for the complex situation, coping with concerns, rebuilding trust while taking into account the perspectives of other people in the organization, rehabilitating relationships and more.

Where it has been decided that the protection seeker will not remain in the organization, the support given will assist in planning their occupational future.

This stage can constitute an occupational turning point, in which due to all that has occurred the protection seeker considers what occupation they would like to engage in, including if they are interested in continuing in their field or switching profession if necessary. The support of the social worker can assist them in finding a new place of work, writing a CV, preparing for interviews and more.

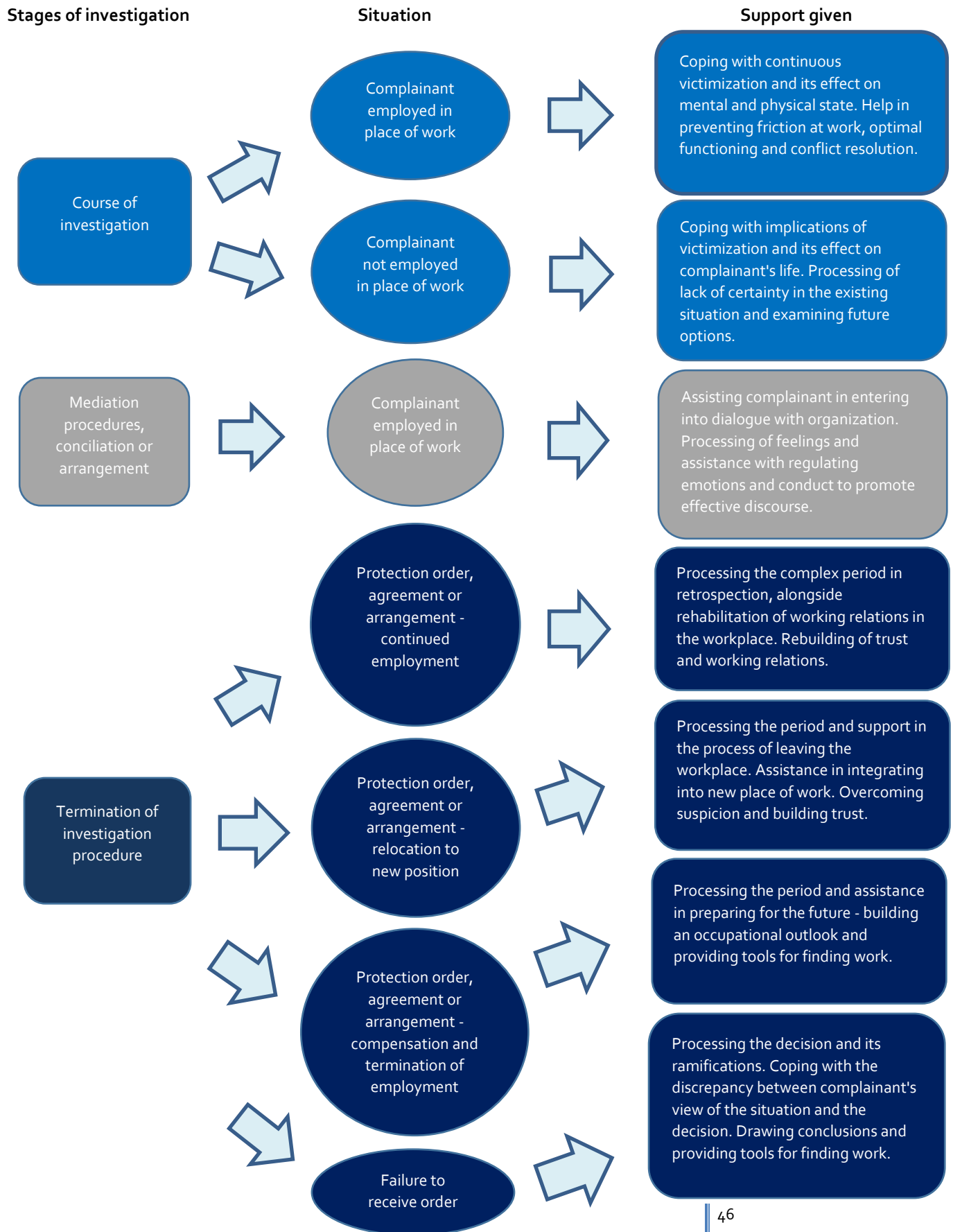
In cases where it has been decided not to grant the protection seeker a protection order, the social worker will assist in processing the disappointment and crisis frequently following the decision. The social worker will also help in making arrangements for the future from different aspects and in finding a new place of work.

**TIP:** Time of termination of support

It is recommended to inform the protection seeker, at the time of clarifying expectations, that the support is limited in time, even if in the initial stage its duration is not always determined. The aim is to clarify in advance that the support does not constitute a counselling framework, which will continue without limitation. Regarding determining the time for terminating the support, it is recommended to hold a separate intra-organizational discussion for each individual case. The organizational dialogue should refer to considerations relating to the situation of the protection seeker, such as their needs and abilities, additional support systems in their life, etc. alongside organizational considerations, which see the larger picture in its entirety.

The following is a diagram illustrating the interface between the stages of the investigation and the support given:

### Interface between investigation and support



## CHAPTER 4: SUPPORT AND TOOLS FOR THE INVESTIGATION TEAM

The model presented so far places the protection seeker at the center and proposes a customized investigation procedure and options for assistance with legal representation and the support of a social worker. However, experience accumulated over the years has taught that the investigation teams play a crucial role in creating an optimal protective framework. The investigation teams are in the front line, required to deal with areas of knowledge with which they are unfamiliar, and with complex conflicts that evoke intense emotions. The investigation teams must therefore be offered the opportunity of receiving professional advice and emotional support, which will help them perform their work to the best of their ability. This chapter will discuss some of the complexities of the investigation team's role and the special coping tools developed by the Office.

### **Assistance in coping with the investigation procedure**

For the investigation team, the procedure for investigating the request for protection as a whistleblower is likely to be complex from an emotional aspect. This stems from the fact that in general, the conflict between the parties is charged with adverse feelings and the fact that many of the people requesting that the Ombudsman recognize them as whistleblowers and give them protection are in a state of ongoing stress, which generates intense distress and a feeling of helplessness.

In addition, some protection seekers see the Office as a last resort. This is likely to raise the expectation that the Office and its representatives will stand by them unconditionally in their struggle. The meeting with the neutral investigation team can thus be a source of disappointment for some protection seekers.

These feelings of difficulty and frustration are likely to lead protection seekers to react to the situation in different ways, including:

- Having intense feeling of being victims, pleading for help.
- Expressing frustration, anger and fury.
- Describing events over and over again in a repetitive manner.

It is thus not easy for the investigation team to encounter the different expressions of difficulty and pain experienced by the protection seeker, and this is likely to exact from them an emotional price.

## **Basket of customized and flexible coping tools**

The fact that the work of the investigation teams is likely to entail coping with complex conflictual situations and meeting with people in severe distress, has led the Office to create a basket of coping tools for them. This basket of coping tools has two functions:

- To make it easier for the staff of the investigation teams to cope on a personal level.
- To furnish the investigation team with tools that will enable them to provide optimal service.

The basket of coping tools that is optimal for the staff of the investigation team includes:

- Professional advice of consultants from outside the designated investigation department.
- Personal support and professional guidance by a social worker.
- Special training adapted to the professional needs (this topic was addressed in Part 3, under the title "Systematic investigation framework").

### **PROFESSIONAL ADVICE**

Protection seekers come from different positions in different organizations. The investigation teams thus require wide knowledge of various fields of employment. Familiarity with the occupational framework of the organization is necessary in order to understand the context and the claims of the parties, and to eventually reach a just decision.

To this end, the investigation teams are able to receive professional support from the different investigation departments within the Office or from the audit divisions within the Office of the State Comptroller.

The support includes assistance with financial analyses, economics and accounting, the analysis of databases, or any other professional advice as required.

### **PERSONAL ASSISTANCE AND PROFESSIONAL GUIDANCE BY A SOCIAL WORKER**

The decision to integrate a social worker into the designated investigation department was reached in order to achieve two aims: one, to provide assistance for people seeking protection as whistleblowers; two, to enable the staff of the investigation teams to receive support and guidance if desired. The choice of a professional from the realm of social work stems from the fact that social workers have special training in human behavior, inter-personal dynamics and professional interventions.



For the investigation teams, the social worker constitutes an intra-organizational function, which enables:

- Personal support - Receiving optional personal support, easily and discreetly, in coping with feelings and difficulties stemming from the meeting with complainants and public bodies.
- Professional guidance - Assistance in analyzing complex inter-personal dynamics in the meeting with protection seekers, developing suitable strategies and making professional preparations for handling complex situations.

The professional guidance includes:

- Choosing the most suitable approach for conducting complex discourse with the protection seeker.
- Giving thought to the precise words to be used in a meeting that is likely to be emotionally charged.
- Getting prepared for the possibility of intense emotional reactions.

In many cases, both types of support for caseworkers, emotional and professional, go hand in hand.

**Example:** The Office handled a case in which the disputes between the parties were intense and accompanied by mutual insults and acts aimed at hurting each other. Both sides would write to the investigation team and phone them several times a day to update them on the events, to complain about the other side and request the investigation team's intervention on their behalf regarding the act they had reported. This behavior of the parties made it very difficult for the investigation team, who found themselves forced to read many messages every day, messages that were emotionally charged and regarding which in most cases there was no room for intervention. Despite repeated explanations to the two parties about this, their behavior did not cease and in addition to the investigation team's regular work being affected, they also had to cope with emotional overburdening and a feeling of helplessness.

The investigation team received assistance from the social worker in order to process the situation from an emotional aspect and develop a professional response to it. Firstly, the social worker focused on attempting to identify which emotional reactions within the investigation team were ignited by this behavior, and to recognize them and observe how they affected their reactions to the situation. Afterwards, they were helped in seeing the situation from the parties' viewpoint, in order to understand the driving force behind their behavior and determine an effective response. The understanding that transpired from this support assisted the investigators in thinking of suitable personal strategies, which helped them create emotional distancing and not be sucked into the conflict. It also provided the parties with a matter-of-fact, clear and defined response, without the situation taking over the whole of the team's workday.

**Example:** A person requesting a protection order, whose matter was investigated over an extended length of time due to its complexity, was found ineligible for a protection order since he did not expose corruption according to the definition and criteria provided by law. It should be pointed out that the protection seeker did indeed suffer victimization at the hands of staff members who saw him as someone who had gone against the organization. Throughout the investigation procedure, the protection seeker continued working in the organization and it was important to him to carry on performing his job to the best of his ability. However as time went on, he found it more and more difficult to differentiate between acts of reprisal and acts that constituted a part of the regular conduct of the organization, feeling that everything was directed against him personally. The investigation team helped him as best as they could where it was clear that the conduct comprised retaliation, but they could not intervene in matters outside their jurisdiction. As time went on, there was a visible increase in the protection seeker's frustration and difficulty in coping.

When the findings showed that the case did not meet the criteria for receiving protection as a whistleblower, the investigation team knew that the conversation in which they would have to inform the protection seeker of the decision would be difficult for both sides. The team received assistance from the social worker, in order to prepare for this potentially complex and emotionally charged meeting. At first, the investigation team was asked to think of and describe the most difficult responses that they could imagine receiving from the protection seeker upon hearing the decision. The team was then asked to try and identify the emotions from which the protection seeker's reactions stemmed, such as disappointment, frustration, helplessness, fury and others.

Afterwards, they considered how they could tell the protection seeker about the decision and the rationale behind it, while giving recognition to his feelings.

The support helped the investigation team cope with their concerns about the meeting and think of effective ways of communicating, which were not defensive or aggressive, but conveyed the decision and the reasons for it in a professional and clear manner, while at the same time making room for the feeling of intense pain that the decision caused the protection seeker.

## CONCLUSION

Whistleblowers are confronted with reprisals that place before them significant difficulties; these difficulties exact on them a heavy price in many areas of life. The Israeli Ombudsman has recognized this and created a protective framework for the whistleblowers, which includes a customized and optimal investigation model, the possibility of receiving legal representation, the support of a social worker and a system of support for the investigation teams, in order to provide protection seekers with the optimal service.

The Israeli Ombudsman attaches great importance to fortifying the status of whistleblowers by protecting them, and believes that everyone who has aspirations for an upright society should act accordingly.

## ANNEX

This paper is based on the experiences and practice of the author this paper, the State Comptroller and Ombudsman of Israel. Since many of our members have experiences in the field of mediation and dispute resolution, the IOI also wants to shine light on practices from other Ombudsman offices. The following sidebar stories (listed in alphabetic order by country) include feedback and observations from IOI member institutions.

### OBSERVATIONS FROM BELGIUM

#### 1. The Federal Ombudsman - Belgium

The Federal Ombudsman is an independent body attached to the Belgian Chamber of Representatives. He examines citizens' complaints about the federal administrations, finds solutions and carries out impartial investigations. He aims to enhance the functioning of the public services and improve the legislation.

Since 2014, the Federal Ombudsman of Belgium handles whistleblower's reports on integrity violations threatening the public interest (corruption, fraud, abuse) in the Federal Civil (public) services. He investigates on the alleged integrity violations and investigates complaints about retaliation actions in order to ensure the protection of the whistleblowers.

Since 2023, following the transposition of the European Directive 2019/1937 on the protection of whistleblowers in national law, the competences of the Federal Ombudsman regarding the public sector were extended and he received an additional competence regarding the protection of whistleblowers: he coordinates the external whistleblower's reports in the private sector by assessing the admissibility of the report and transferring it to the competent authority to investigate on the matter. He also ensures the protection of the whistleblowers in the private sector.

The two laws that regulate the protection of whistleblowers at the federal level in Belgium and give its competences to the Federal Ombudsman regarding whistleblower's reports and protection are:

- The [Act of 28 November 2022](#) on the protection of whistleblowers in the private sector
- The [Act of 8 December 2022](#) on the protection of whistleblowers in the Federal public sector (abrogating the previous Act of 15 September 2013 on reporting integrity violations in the federal public sector)

## **2. Protection by the Federal Ombudsman**

The Federal Ombudsman grants protection to whistleblowers who have used one of the three different reporting channels:

- Internal reporting
- External reporting
- Public disclosure

The protection is granted for any type of retaliation: dismissal, disciplinary measure, a poor performance review, refusal of a promotion, transfer, isolation, etc.

The protection is granted automatically to a broad scope of people, i.e. the whistleblower but also:

- third parties connected to the whistleblower (colleagues, close relatives...)
- facilitators, i.e., anyone who helped the whistleblower to report the facts
- any legal entities connected to the whistleblower (his company for instance)
- in the public sector, the witnesses or people who cooperated in the investigation into the report including their adviser (trade union representative, colleague)

The duration of the protection is unlimited in time.

### **2.1. Confidentiality of the identity**

The most effective way to ensure the protection of whistleblowers is to ensure the confidentiality of their identity. The Federal Ombudsman set up the Center for Integrity<sup>7</sup>, which is a dedicated service to handle whistleblower's reports and complaints against retaliation. Only the members of the Center for Integrity have access to the information, which is strictly separated from the rest of the activities of the institution (IT means, separate closed offices, etc.).

### **2.2. Extra-judicial protection against retaliation**

In the public and the private sector, every protected person can file a complaint for retaliation. The Federal Ombudsman will investigate the complaint by asking the involved organization to prove the reasons upon which the negative measure against the protected person have been taken. The organization has four weeks to give its written, clear and well-documented report to the Federal Ombudsman.

The reversal of the burden of proof applies: it's up to the organization to prove that there is no causal connection between the negative measure and the report.

If the organization fails to prove that the negative measure has been taken for a reason independent from the whistleblower's report, the Federal Ombudsman will conclude that there is a causal connection and that the negative measure is a "retaliation".

If there is a retaliation, the Federal Ombudsman will propose to the organization, within 20 days, to revoke the negative measure or to compensate the prejudice.

In the public sector, if the organization refuses to follow such a proposal, the Federal Ombudsman will issue a recommendation with copy to the competent minister and inform Parliament. The Federal Ombudsman will advise the organization that took the retaliation action to start a disciplinary procedure against the person responsible for the retaliation.

The laws for the private and the public sector also foresee criminal sanctions against persons who take retaliation action against protected persons with six months to three years imprisonment or/and a fine from 600€ to 6000€.

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<sup>7</sup> That is: the two Federal Ombudsmen and a team of forensic auditors, members of Staff providing administrative/ IT support and a coordinator.

### **2.3. Temporary assignment to another service or another organization**

In the public sector, the protection status also foresees the possibility to temporarily assign a protected person to another service or to another administration if he/she requests it. This is possible for a duration of one to a maximum three years and after having received a favourable opinion from the Federal Ombudsman and the approval of the competent minister.

To evaluate the request and formulate an advice, the Federal Ombudsman will ask each party (i.e., the protected person and the administration) for their point of view on the matter.

### **3. Support measures for the whistleblowers by the FIHR**

Before the transposition of the EU Directive 2019/1937, Belgium did not have support measures for whistleblowers. Based on his experience in handling whistleblower's reports since 2014, the Federal Ombudsman noted that there was a lack of support for whistleblowers who often find themselves in a difficult situation in their workplace but also psychologically.

Since 2023 and the two new laws on whistleblowing, whistleblowers can make a request for support measures with the Federal Institute for Human Rights, an independent public institution established by Parliament.

The support measures may include :

- psychological, social, technical and media support
- legal assistance in criminal or civil proceedings and
- financial assistance in legal proceedings



#### **4. Concluding remarks**

The intervention by the Federal Ombudsman of Belgium in the whistleblowers protection constitutes an asset because it provides a first non-judicial step to address or compensate the retaliation measure. It allows to avoid long, costly and tedious judicial procedures.

The broad scope of people who are granted a protection status is also an asset because some witnesses can be in a vulnerable position, and this protection should allow them to speak more freely and without fear of retaliation.

The automatic protection and reversal of the burden of proof work well because it makes the process easier for protected people.

The challenge for the coming years for the Federal Ombudsman will be the implementation of the extra-judicial protection procedure in the private sector, which is a new field of intervention for the Federal Ombudsman.

In general, ensuring the protection remains challenging because retaliation can be very insidious and is not always easy to prove.

#### **5. Additional information**

[www.federalombudsman.be](http://www.federalombudsman.be)

email: [contact@federalombudsman.be](mailto:contact@federalombudsman.be)

## **OBSERVATIONS FROM CROATIA**

On behalf of the Office of the Ombudswoman of the Republic of Croatia, we would like to congratulate the State Comptroller and Ombudsman of Israel for making a Best Practice Paper on Whistleblower Protection and to thank them for sharing the Israeli experience among the IOI Members on such an important and challenging topic as whistleblower protection.

It is truly enriching and helpful to get a detailed insight into another Ombudsman Institutions' way of dealing with the subject of whistleblower protection, not only by giving a comprehensive overview of the normative aspect of the protection of whistleblowers and the effective systematic framework for investigating requests for protection, but also by addressing the much needed legal representation, as well as the support for those seeking protection and by discussing the working tools and support for the competent staff in the investigation team.

We sincerely understand the numerous obstacles whistleblowers need to overcome while reporting information of significant public importance, as well as the difficulties that competent staff and other relevant stakeholders face in dealing with whistleblower cases, considering that the Croatian Office of the Ombudswoman performs whistleblower protection-related activities since 1 July 2019, when it became the competent authority for external reporting of irregularities.

Therefore, we use this opportunity to share some of the experiences of our institution in the protection of whistleblowers.

Firstly, according to the Act on Protection of Persons who Report Irregularities (Official Gazette, No. 17119) and, at the moment, according to the Act on Protection of Persons who Report Irregularities (Official Gazette, No. 46122), which transposed the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, we receive reports on violations of law that harm the public interest from natural persons who report or publicly disclose information on irregularities acquired in the context of his or her work-related activities, both in the public and private sector.

After receiving reports on irregularities, we transmit these reports to authorities competent to act based on the content of the report in a safely and timely manner. Although we do not have investigative powers due to reported irregularities, competent authorities have to inform us of their investigative proceedings and their outcome.

Furthermore, we also examine reports in order to protect reporting persons if the reporting person has made known that he or she is or may be a victim of retaliation due to the reporting of irregularities. Consequently, we produce a report assessing whether the constitutional or legal rights of the reporting person are being threatened or violated. If this is the case, we can issue recommendations, opinions, proposals and warnings to the reporting persons' employer, who is obliged to inform us on the measures undertaken. There is also power to intervene in the court proceeding initiated by the reporting person seeking the judicial protection and we can initiate the misdemeanor proceeding for offences regulated by the Act on Protection of Persons who Report Irregularities.

In order to make reporting easier, we published the most important information on the protection of reporting persons (guidelines in relation to internal and external reporting) on our official website, as well as the form of a potential report. Except being the competent authority for external reporting, we also monitor the protection of persons reporting irregularities via internal channel through an information on received reports and decisions on reports that the internal channels have to deliver to us within 30 days of a decision on the report, by using the form we created and made available on our website.

In order to make high standards of whistleblower protection truly effective in practice we provide education for numerous relevant stakeholders - holding workshops for internal channels (confidential persons and their deputies), giving lectures and discussing mock cases on workshops for judges and public prosecutors in cooperation with Croatian Judicial Academy, making on-line lectures for lawyers in cooperation with Croatian Bar Association and discussing normative framework and best practices of whistleblower protection on seminars tailor-made for trade unions, workers and employers.

We also share our experiences on whistleblower protection and discuss the dilemmas stemming from the Directive as being active members of the Network of European Integrity and Whistleblowing Authority (NEIWA) since December 2019.

We strived to briefly share our experiences and practices in the whistleblower protection mandate and we strongly greet every effort made by fellow Ombudsman institutions worldwide to share

their experiences and lessons learned in order to provide protection to those who are willing to "blow the whistle" for the benefit of the whole of society.

## **OBSERVATIONS FROM GUATEMALA**

The Human Rights Ombudsman of Guatemala (PDH) welcomes the document shared by the State Comptroller and Ombudsman of Israel regarding the protection of whistleblowers in the context of investigations into allegations of corruption.

The fundamental role in the defence, protection and promotion of human rights is a constant in all national human rights institutions. However, there are specific mandates of some human rights institutions that establish substantial differences in their mandates. The analysis of the document shared by the State Comptroller and Ombudsman of Israel establishes two fundamental differences with respect to the mandate of the Guatemalan Human Rights Ombudsman.

The first of these differences concerns the function of the State Comptroller. In Guatemala, this function is carried out by the Office of the Comptroller General of Accounts, whose functions are contained in the Organic Law of the Office of the Comptroller General of Accounts, Decree 31-2002. Its main objective is to direct and execute with efficiency, timeliness, diligence, and effectiveness the actions of external and governmental financial control, as well as to ensure the transparency of the management of state entities or those that manage public funds. The Office of the Comptroller General of Accounts can promote ex officio and be a plaintiff in lawsuits against public officials and employees. In addition, it can file complaints before the Public Prosecutor's Office for acts of corruption committed by public officials.

The other fundamental difference in the mandates of the two Ombudsman's Offices is related to witness protection. The Guatemalan Human Rights Ombudsman is empowered to investigate all kinds of complaints about human rights violations and administrative behavior harmful to individuals and in that context to seek redress for the victim. By law, it does not have the mandate to protect witnesses; this function is carried out by the Public Prosecutor's Office, which is the institution responsible for criminal prosecution and witness protection.

Furthermore, the PDH, according to the Political Constitution of the Republic, Article 274 and 275, must supervise the (public) administration and promote the proper functioning and streamlining of government administration around human rights. It is for this mandate that, through the 17 thematic ombudsmen's offices and the 35 auxiliary offices deployed throughout the national territory, it carries out "Supervisions of the Public Administration", which consists of a brief social investigation with the aim of verifying the fulfilment of the functions of State institutions, in the context of human rights.

A report is drawn up on the administrative supervisions, describing the findings, conclusions, and recommendations. Some monitoring reports contribute to the human rights investigation process and are added to these files. The recommendations of the Human Rights Ombudsman are not binding. However, due to the relevance of the Human Rights Ombudsman's Office, most public officials take action to comply with the recommendations of the Human Rights Ombudsman.

The exposition of the method of investigation used by the State Comptroller and Ombudsman of Israel is evidence of democratic, institutional strengthening and separation of powers. It follows that the protection of whistleblower witnesses is intended to promote whistleblowing and thereby combat corruption. While corruption undermines the realization of human rights, it is a challenge for national human rights institutions to address it.

## **Directory**

**José Alejandro Córdova Herrera**

Human Rights Ombudsman

**María Eugenia Rivera Lacayo**

Deputy Prosecutor I

**Ana Gabriela Cruz Leal**

Deputy Prosecutor II

**Nadia Paola Palma Herrarte**

Secretary General

## OBSERVATIONS FROM INDONESIA

### Regarding the Systematic Investigation Framework

In general, the model and stages of investigation used are similar to the investigation model employed by the Indonesian Ombudsman (ORI) in handling the current Public Complaints. However, there are several noteworthy differences:

1. The authority to request provisional protection appears to be less relevant in the context of ORI, as the identity of whistleblowers is already protected from the beginning.
2. The handling of a single complaint is not assigned to a single officer but to a team (consisting of at least two officers), which allows for ongoing discussions throughout the process.
3. During the mediation process, although it takes place in the midst of the investigation, the two processes are entirely separate. The mediator is not provided with the investigation findings, and vice versa. In contrast, in the ORI process, the mediator has access to the investigation findings, and the information exchanged during mediation may be used in the continuation of the investigation.
4. Formalizing a pre-decision process before issuing recommendations. This may appear similar to corrective action, but it differs in that corrective action requests something as if it were a final product, whereas in the Israeli concept, pre-decision is explicitly emphasized.
5. There is a process of "approval" by the whistleblower for the draft letter that the Ombudsman will send to the institution concerned, and this relates to the issue of the Ombudsman's independence.

Institutionalizing hierarchical discussions in decision-making, involving the investigation team, legal advisors, cross-functional units, and the investigator presenting findings in Ombudsman meetings.

**Regarding the support from social workers to the whistleblowers and investigators**

This is a highly interesting concept that can be adopted. The issue of psychological fatigue actually occurs in the Indonesian Ombudsman (ORI), especially among the Assistants who interact with the complainants, particularly those who exhibit challenging behaviour. The support of social workers who understand the psychological aspects is crucial, both in providing assistance when dealing with difficult complainants and in offering psychological support or consultations for the Ombudsman Assistants themselves.



## OBSERVATIONS FROM MOLDOVA

On 12 November 2018, Law no. 122 regarding whistleblowers entered into force, the purpose of which is to increase the cases of disclosure of illegal practices and other disclosures of public interest by: promoting the climate of integrity in the public and private sectors; ensuring the protection of whistleblowers from retaliation in the context of examining public interest disclosures of illegal practices; preventing and sanctioning reprisals against whistleblowers.

Law no. 122/2018 establishes that the National Anticorruption Center is responsible for examining illegal practices, and the People's Advocate ensures the protection of whistleblowers in cases of external and public disclosures of illegal practices.

According to Law no. 122/2018, the Ombudsman ensures the protection of whistleblowers in accordance with the provisions of Law no. 52/2014 regarding the Ombudsman (Ombudsman) and applies its internal instruments and procedures, which, if necessary, are adapted to the conditions and provisions of Law no. 122/2018.

In carrying out his duties of the protection of whistleblowers, the People's Advocate:

- receives and examines requests for the protection of whistleblowers, as well as examines ex officio referrals regarding the protection of whistleblowers who have made public disclosures, provided they express their consent to benefit from the protection of the People's Advocate;
- contributes to the cancellation of retaliatory measures and the amicable resolution of conflicts between whistleblowers and public or private entities;
- elaborates recommendations regarding the measures to be taken for the immediate reinstatement of whistleblowers;
- ensures the submission of actions in the courts and intervention in processes to submit conclusions in order to defend the rights and freedoms of whistleblowers.

Since the institution of whistleblowers, in the version of Law 122/2018, contains several innovations, in particular, when it comes to the ability of the People's Advocate with powers to ensure the protection of whistleblowers, public authorities, including the People's Advocate Office, still do not have a strengthened experience on the effective implementation of this law.

Moreover, the concept of integrity whistleblower is not known to the general public in the Republic of Moldova, and potential whistleblowers still do not very well know the protection guarantees, as well as the possibility of using this tool.

The Ombudsman shares the idea that whistleblowers are one of the best sources for uncovering illegal and unethical practices at the level of entities (public or private), they know best and can report these violations "straight from the source". However, taking into account the fact that disclosures can significantly affect their professional life, and even have repercussions on their personal security, it is very important that they are encouraged, informed, but also protected during the whole process.

They need to be provided with easily accessible information on the procedures applied, the guarantees they can benefit from and assistance from public sector actors and civil society, including the media. Currently, all this information infrastructure is almost non-existent and needs to be built in an efficient manner, so as to ensure the full implementation of the institution of whistleblowers in the Republic of Moldova.

In order to fully contribute to the implementation of the information mechanisms, as well as the protection of whistleblowers, the People's Advocate Office carried out and undertook several actions. Thus, during 2020-2021, the Office of the People's Advocate, in collaboration with UNDP Moldova and the National Anticorruption Center, carried out an information campaign in support of whistleblowers among the medical staff, releasing a video spot and several informative materials on this topic. At the same time, on the website, the application "Submit an online request for protection as a whistleblower" was developed and launched, intended for people who want to request protection: <http://ombudsman.md/avertizari-de-integritate/>, ensuring the confidentiality and safety of the information transmitted.

Also, the People's Advocate Office developed and launched, with the support of the UNDP project, an online training course on the theme "Whistleblowers" integrated into the E-LEARNING application (<http://ombudsman.md/courses/>), launched by OAP on the institution's website [www.ombudsman.md](http://www.ombudsman.md). Through the "Whistleblowers" course, the institution proposed the online study by users of the components and specifics of the integrity whistleblower institution, as well as familiarizing users with the competences of the People's Advocate Office in this field. The course provides information about whistleblowers, whistleblower action conditions and protection

offered. By completing the online course, users have the opportunity to check their knowledge on the same platform. The course is developed in Romanian and Russian.

Subsequently, during the years 2022-2023, the Office of the People's Advocate together with the National Anticorruption Center, the National Integrity Authority and the Agency for the Administration of Judicial Courts carried out the national information and awareness campaign "Integrity: a precondition for preventing the risks of corruption" which aims to strengthen, promote and fortify the values of integrity, including the mechanism of integrity whistleblowers in the education and involvement of judicial staff in the process of promoting this mechanism.

The People's Advocate institution does not have consistent experience in the field of granting protection to whistleblowers, but it has already accumulated some experience through the examination of the first applications for granting protection to whistleblowers. Thus, the People's Advocate in the process of investigating and examining requests for the protection of whistleblowers using the procedures provided by the Law on the People's Advocate, analyzes and documents the situation described in the requests for protection, the causal link between the disclosure made and the retaliatory measures, the chronology of events, the duration of the periods between the disclosures and the retaliatory measures, the magnitude of the public interest in the disclosure made and the severity of the retaliatory measures (application of the sanction of dismissal from public office).

Further to this analysis, if it finds that the petitioners fall under the conditions provided for by Law no. 122/2018 and are to benefit from the protection offered under this Law, including the protection guarantees from the People's Advocate, forward it to employers, persons with positions of responsibility, pursuant to Article 24 paragraph (1) and paragraph (3) of the Law on the People's Advocate (Ombudsman). One notice each containing recommendations on the measures to be taken for the immediate reinstatement of whistleblowers: the immediate cessation of any actions of extortion, pressure, disadvantage, discrimination manifested by threats of dismissal, in one of the cases even dismissal from the public office, which are related to the integrity warning or resulting from it.

At the same time, the Ombudsman recommends canceling the orders to sanction whistleblowers and ensuring compensation for the material and moral damages suffered as a result of the retaliation, as the case may be. Since the employers (from the already existing practice) do not

want to implement the recommendations of the Ombudsman, referring to the labor legislation, namely, that the sanctioning order be challenged in court, the Ombudsman under art. 25, paragraph (3) of Law no. 52 regarding the People's Advocate, intervenes in the court process to submit the conclusions.

Thus, the courts examining the administrative litigation cases regarding the annulment of the unfavorable individual administrative act and the obligation to issue the favorable administrative act issue the judgments. Already, from the existing practice, the People's Advocate has concluded that not every time the courts know and apply the whistleblower mechanism. For these reasons, the Ombudsman recommended the National Institute of Justice, in the process of continuous training of judges, to inform the judicial environment about the mechanism of whistleblowers.

Since the whistleblowers mechanism is not fully used and applied in the Republic of Moldova neither by employers nor by employees, even if several efforts have been undertaken by the authorities and civil society in promoting and applying this mechanism, the Ombudsman Institution continues its activities in order to inform professionals, as well as employees in the public and private system, about the guarantees offered by the whistleblower mechanism so that the Whistleblower Law achieves its goal.

## **OBSERVATIONS FROM NIGERIA**

This is a paper forwarded to the Public Complaints Commission (The Nigerian Ombudsman) by the International Ombudsman Institute written by the office of the State Comptroller and Ombudsman of Israel edited and published by the International Ombudsman Institute (IOI) in the framework of its Best Practice Paper Series. The paper seeks to address the protection of whistleblowers.

The paper in its totality is beneficial and valuable to the wider Ombudsman community dealing with the protection of whistleblowers. The document examined the normative aspects of the protection of whistleblowers, taking into account international norms and the norms established by Israeli legislation on the subject matter. It went further to address the systematic framework within which the Israeli Ombudsman acts, as well as the unique applied model that has been developed for investigating requests for protection. The paper also addressed the eligibility of those requesting protection and the support given by social workers employed by the Office of the State Comptroller and Ombudsman of Israel. Finally, it addresses the support and work tools given to the investigation team. The paper is indeed commendable and detailed towards the protection of whistleblowers, however some small suggestions are raised and discussed below for an effective and efficient protection of whistleblowers.

### **Introduction**

Corruption has always been a phenomenon which is difficult to identify, the very essence of corruption which is invariably committed in secrecy with fewer to no witnesses, involves less participants, which the normal crime busting agencies may experience challenges in dealing with it efficiently.

Corruption and the fight against corruption is not limited or peculiar to Nigeria or Africa alone, but rather a global social pandemic creeping across almost every nation state including the most developed countries. This has however led to the domestication of whistleblowing policy to strengthen their anti-corruption laws.

The concept of whistleblowing is becoming popular across the globe due to the increasing demand for accountability and transparency in governance, reporting of wrongdoing in private or public organizations, is in the interest of the authorities concerned and the public at large. A

whistleblower is privy to informations about their employer by virtue of their position within an organisation. The revelation made could be disastrous both to the organization reported and to the person making the report.

Ordinarily, because of the existence of common law duties of trust, loyalty and confidence, a whistleblower could be legitimately dismissed and prosecuted for disclosing such information of corruption or misappropriation of public funds as the case may be. In light of this, many countries are now abandoning this old harsh common law principles in favour of laws protecting whistleblowers against any consequences of their revelation.

In the struggle for transparency and accountability, whistleblowers play an invaluable role, thus their protection is of paramount importance against victimization, to enable them to come forward to report misconducts, misappropriation, malpractices as well as corruption without fear of retribution or personal detriment in the society.

Whistleblowing policy has contributed to a large extent in raising awareness and consciousness of citizens regarding their vital role in the fight against corruption. The emergence of courageous and patriotic individuals who are today referred to as whistleblowers are ambassadors or agents of change, they are being described as heroes. This has also changed the common perception that the fight against corruption is the business of the state, while in real sense, it is a collective responsibility. The conspiracy of silence in reporting corrupt episodes and other irregularities as obtained in traditional societies may no longer prosper in contemporary fight against corruption.

Encouragement of whistleblowing must be associated with corresponding protection for the whistleblower. Public spirited persons with courage to report infractions need to be protected from being subjected to intimidation and detriments, such detriments in the nature of harassment to include legal action, criminal charges, social stigma and termination from any position, office, or job. It is also reported that, individuals who have blown the whistle while with one employer and have subsequently left, have had difficulty securing further employment with a new employer as a result of being known as a whistleblower.

This has been referred to as a form of “blacklisting” of whistleblowers.<sup>8</sup> In many countries, whistleblowing is even associated with treachery or spying.<sup>9</sup>

### **Legal Aspects of Whistleblowing in Nigeria**

The Nigerian Ombudsman institution submitted to the Nigerian Legislature, a Bill for an Act to repeal the Public Complaints Commission Act, CAP P 37, Laws of the Federation of Nigeria, 2004 and enact the Public Complaints Commission Act, 2022 for the establishment of the Public Complaints Commission with wide powers to inquire into complaints by members of the public concerning the administrative actions of any public authority and companies or their officials, to provide a legal framework for making public interest disclosures from whistleblowers. The mode of making public interest disclosure provided under the bill can be made orally or in writing to the Commission or to an appropriate authority as prescribed by the Bill.<sup>10</sup> The Bill also made provisions for immunity and protection to a person who discloses an information for the public interest, this includes a person who makes a public interest disclosure under the Act, does not incur civil or criminal liability for doing so, a person is not liable to any disciplinary action under a written law, is not to be dismissed, is not liable to have his service dispensed with or terminated, such a person is not liable for any breach of secrecy or confidentiality or any other restrictions on disclosure.<sup>11</sup> By the provisions of the Bill, if a person who takes or threatens to take detrimental action against another person because a person has made, or intends to make, a public interest disclosure under the Bill commits an offence and is liable on conviction to a fine or imprisonment or both. By this provision stipulated by the Bill, if passed to law by the Legislature, it can serve as a deterrence for those who might have the notion of doing so.

### **Remedies and Compensation for an act of victimization**

By the provisions of section 34 of the Bill<sup>12</sup>, any person who threatens another person who has disclosed a public interest disclosure under the Bill commits an offence of victimization which may be dealt with as a tort, and a person may present to the Commission a complaint that they have been subjected to the act of victimization in contravention of the Bill. Where such victimization led to the termination of the person’s employment, such a person is entitled to compensation for any loss they have suffered.<sup>13</sup>

<sup>8</sup> Department for Business innovation and Skills. “*The Whistleblowing Framework a call for Evidence*”, July 2013

<sup>9</sup> David Banisar “*Whistleblowing: International Standards and Developments*”; *Corruption and transparency: Debating the Frontiers between State, market and Society. World Bank-Institute for Social Research*, UNAM, Washington, D.C. 2011

<sup>10</sup> S. 28 A bill for the Public Complaints Commission Act, 2022

<sup>11</sup> S. 33 *ibid*

<sup>12</sup> Public Complaint Commission Act 2022

<sup>13</sup> S. 35 A bill for the Public Complaints Commission, 2022

The adoption of whistleblowing policy as a public policy in Nigeria has also led to the introduction of two Bills:

1. Whistleblower Protection Bill, 2008 and
2. Safeguarded Disclosure (Whistleblowers, Special Provision) Bill, 2009

The Whistleblower Protection Bill 2008 (WPB), seeks to provide for the manner in which individuals may in the public interest disclose information that relate to unlawful or other illegal conduct or corrupt practices of others; and it also makes provisions for protection against victimization. On the other hand, the Safeguarded Disclosure (Whistleblowers, Special Provisions, etc) Bill, 2009 (SDB) seeks to make provisions for the procedure in terms of which persons employed in the public or private sectors may disclose information regarding unlawful and other irregular practices and conduct in a workplace; and to provide protection against any occupational detriment or reprisals against the whistleblower.

#### **To what extent is the whistleblower protected by the provisions of the bills?**

Protection afforded to whistleblowers in the two bills can be categorized into:

**Pre- disclosure protection:** By this, provisions are made in the bills to the extent of invalidating any provision in a contract of employment or similar arrangement between the employer and employee throughout Nigeria which is intended to exclude the provisions of the bill or which precludes responsibilities imposed or which discourages the employee from making a safeguarded disclosure under the bills<sup>14</sup>.

**Post- disclosure protections:** No whistleblower shall be subjected to victimization by his employer or fellow employees because they have made a protected disclosure. Where a whistleblower has been victimized as a result of his disclosure<sup>15</sup>, they can lodge a complaint before the Commission for redress. They can also bring an action in the High Court for damages, breach of contract<sup>16</sup>. Further, where a whistleblower has reasonable cause to believe that their life or property or that of any of their members is in danger, they may request protection from the police. The police are mandated by the bill to provide adequate protection.<sup>17</sup>

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<sup>14</sup> S. 3 (2) of the Whistle Protection Bill 2008

<sup>15</sup> S.12 *ibid*

<sup>16</sup> S. 14 & 15 *ibid*

<sup>17</sup> S. 17 *ibid*



A whistleblower is not liable to civil or criminal proceedings because of their disclosure unless it is proved that they knew that the information they disclosed is false and was made with malicious intent.<sup>18</sup>

## **Recommendations**

### **What needs to be done?**

The main reasons people give up for not reporting corruption are:

1. fear of the consequences (legal, financial, reputational)
2. the belief that nothing will be done, that it will not make any difference even if corruption is reported
3. uncertainty about how, where and to whom to report
4. absence of awareness of laws/legislations on the protection of whistleblowers

### **What we're doing about it**

Transparency International (the global coalition against corruption) would like to see more people speak up against corruption and other wrongdoings, ultimately reducing misconduct. A protective environment for whistleblowers is crucial to allow them to report instances of malpractice without having to face the dilemma of doing the right thing and risking one's career and livelihood or remaining silent, at the expense of the public good.

To make this happen, Transparency International is

1. advocating for the adoption of robust and comprehensive whistleblower protection legislation
2. advocating for the effective enforcement of whistleblower protection legislation by the responsible authorities
3. working with public institutions and private companies so that whistleblower protection legislation is effectively implemented in the work place
4. Supporting and advising individuals who are considering or have already blown the whistle, through our Advocacy and Legal Advice Centers.

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<sup>18</sup> S. 18 ibid

### **The relevance of appropriate whistleblowing legislations**

Appropriate whistleblowing legislation and the means to enforce it are necessary to support a culture of compliance and integrity. Several international conventions recognise whistleblowing as an effective tool for fighting corruption, fraud and mismanagement, and commit the signatory countries to implement appropriate legislation. However, existing legal provisions are fragmented and weakly enforced in most jurisdictions. Only in rare cases do they provide sufficient protection for whistleblowers. Many laws may cover only the public sector or may not be tailored to the specific needs of whistleblowers. This feature limits protection to formal employees, leaving informal workers, consultants, contractors or suppliers outside the scope of the law. Also, there may be an over-reliance on general criminal laws that oblige individuals to report criminal offences to a country's law enforcement authorities. In such circumstances, the assumption is that individuals would automatically be exempted from any form of retaliation if a crime was involved. Practice has shown, however, that the existence of a legal duty to report is seldom a satisfactory alternative to a proper whistleblowing policy and protective measures. The same problem applies to the reliance on witness protection mechanisms. Not all whistleblowers are witnesses. They often do not have any concrete evidence, but only suspect wrongdoing. As a result, witness protection mechanisms do not provide sufficient protection to whistleblowers, nor do they pursue the same goal. At the same time, the overall legislative framework needs to provide sufficient protections and compensation for those wrongly accused, even by whistleblowers who report in good faith. The assumption of innocence needs to be respected until responsibility is sufficiently proven.<sup>19</sup>

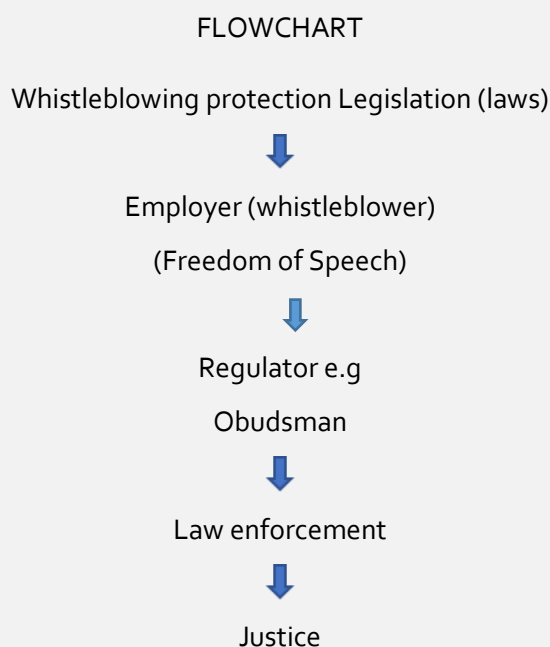
### **Advocating for the effective enforcement of whistleblower protection legislation**

While the existence of a legal framework is a pre-condition for whistleblower protection, it is not sufficient. Legislation needs to be effectively enforced and should be as sound and consistent as possible. To ensure the proper implementation of legal provisions, an independent public body with sufficient autonomy should be set up or designated to oversee the functioning of the law and to receive and investigate complaints. Enforcement should include consultations with key stakeholders so that whistleblowing policies can be agreed upon and put into effect.

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<sup>19</sup> Transparency International, " *Whistleblowing : An Effective tool in the fight against corruption* "

Considering how legal accountability works in each legal system and who has power to address a problem or make changes will help member States identify the appropriate recipients for public interest, reports and disclosures. The need for an effective enforcement of the whistleblower protection legislation contributes to the protection of a whistleblower to a large extent.



The flowchart shows who is closest to the problem (i.e. the object of the whistleblowing) and, therefore, who is the closest placed in terms of accountability and potential reporting and disclosure. Reporting crimes and freedom of expression are included. All channels are interconnected, without any order of priority, and should be available and protected in an appropriate way.

#### **Advice, awareness and assessment**

The law on protecting whistleblowers and what it means in practice needs to be promoted across all sectors. The value of whistleblowing in detecting and deterring corruption, preventing wrongdoing and minimizing serious risk to people or the environment, will not be recognized if the purpose and application of the law is not properly understood or promoted. Employers need to understand what will and can happen if they victimize or fail to deal with reprisals taken against a whistleblower and fail to investigate a report of wrongdoing or serious risk. In such circumstances, there is clearly a risk that the wrongdoing or problem will cause greater damage or harm, and that

the whistleblower will have a strong claim against the employer and be protected in law for making a disclosure in the public domain.

To change this perception, whistleblowing needs to be promoted as an effective tool for stopping corruption and serving the public interest. Governments should lend their support to public information campaigns as well as initiatives to promote whistleblowing that are carried out by professional groups and Ombudspersons. Whistleblowers should not only be protected by public authorities, but also honored and actively supported.

### **Compensation of whistleblowers**

To encourage whistleblowing, a reward system, including monetary rewards could be included in the law as part of the whistleblowing protection mechanism. In the United States the government<sup>20</sup> through the U.S. False claims Act, allows a whistleblower to receive up to 30% of the amount retrieved by the government. The South Korean Anti-Corruption Act, allows whistleblowers to recover up to 20% of the recovered amount<sup>21</sup>. Indonesian law also provides for the granting of “tokens” of appreciation to whistleblowers that have assisted efforts to prevent and combat corruption<sup>22</sup>.

### **Conclusion**

The major goal of the Ombudsman is to restore the dignity of man through the enthronement of the rule of law and the protection of the individual/organization against administrative injustice. The Ombudsman is a machinery for the control of administrative excesses. It is an organ of the government set up to redress complaints lodged by aggrieved citizens or residents. It is therefore the responsibility of the Ombudsman to educate agency employees about prohibition on retaliation for disclosures and also educate agency employees who have made or are contemplating to make disclosures about their rights and remedies against retaliation for protected disclosures. To also encourage research into the causes of corruption and motivations for whistleblowing; provide effective protections for whistleblowers; create awareness among public servants of the value of whistleblowers and the protections afforded to them; close the loopholes identified through consultations.

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<sup>20</sup> Paul Latimer and A.J. Brown, Whistleblower Laws: International Best Practice (November 01, 2008) Monash University Department of Business Law & Taxation Research Page No. 1326766 pp. 21, 22.

<sup>21</sup> Korean Anti-Corruption Act

<sup>22</sup> Article 42 Law No.31 of 199 on the Eradication of the Criminal Act of Corruption

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